Supreme Court, U.S.
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No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FAIRFAX HOSPITAL

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals' conclusion that solicitation by Fairfax Hospital supervisors in patient care areas invalidates the Hospital's no-solicitation/no-distribution rule and establishes a ground for finding disparate enforcement of the rule is contrary to the clear meaning of Section 8(c) of the National Labor Relations Act and *NLRB v. United Steelworkers of Am., CIO (Nutone, Inc.)*, 357 U.S. 357 (1958).

2. Whether the court of appeals' rejection of Fairfax Hospital's argument that it should be able to observe and photograph union organizers who are demonstrating on or near its property without violating Section 8(a)(1) of the National Labor Relations Act is contrary to *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992).

3. Whether the National Labor Relations Board's "business justification" standard for determining the validity of off-duty access rules as set forth in *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976), gives sufficient consideration to an employer's property rights as mandated by the Supreme Court in *Lechmere*.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the following entity was a respondent-intervenor in the court of appeals and is a respondent in this Court:

District of Columbia Nurses Association

Pursuant to Rule 29.1 of the Rules of this Court, Petitioner Fairfax Hospital states that the following entity is its parent organization:

Inova Health System
8001 Braddock Road
Springfield, Virginia 22151

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Fairfax Hospital (the "Hospital"), through its undersigned attorneys, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App., *infra*, A-1 - A-26) is unpublished. The opinion of the National Labor Relations Board ("NLRB" or the "Board"), which was enforced by the court of appeals, is published at 310 N.L.R.B. No. 39 (1993). App., *infra*, A-27 - A-36.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1993. The court's order denying the petition for

rehearing and suggestion for rehearing in banc was entered on January 4, 1994. App., *infra* A-87 - A-88. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) of the National Labor Relations Act (the "Act") [29 U.S.C. §158(a)(1)] and Section 8(c) of the Act [29 U.S.C. §158(c)] are set forth in the Appendix, *infra*, at A-92.

STATEMENT OF THE CASE

In the summer of 1988, the District of Columbia Nurses Association ("DCNA" or the "Union") began a vigorous campaign in an attempt to organize registered nurses ("RNs") at Fairfax Hospital. The Union promoted itself to the approximately 1600 RNs working at the Hospital with flyers on bulletin boards, on car windshields and in mailboxes, the wearing of Union pins and buttons by Union adherents, direct solicitation and distribution of Union materials in the Hospital, and demonstrations and meetings on or near Hospital grounds.

The No-Solicitation/No-Distribution Rule

The Hospital responded to the Union representation campaign with a communications campaign of its own. The Hospital held meetings with the RNs to explain its opposition to the Union and used supervisors to solicit support for its position and distribute antiunion literature to the RNs. Beginning in November, 1986, almost two years prior to the start of the Union's campaign, the Hospital had implemented a policy prohibiting employees from soliciting or distributing literature for any purpose during working time or at any time in patient care

[1] The Hospital's no-solicitation/no-distribution rule prohibits solicitation by employees during work time for any purpose, and specifically prohibits solicitation at all times in patient care areas which are identified as patient rooms; operating and recovery rooms; nurse's stations; rooms where patients receive treatment, such as treatment rooms of the emergency department, radiology, and therapy rooms; corridors adjacent to patient rooms,

areas.[1] In virtually every case, the solicitation and distribution by Hospital supervisors was consistent with the Hospital's no-solicitation/no-distribution rule for employees. On rare occasions, however, Hospital supervisors engaged in antiunion solicitation or distribution in areas designated as patient care areas under the rule.

The May 5th Demonstration

On May 5, 1989, a demonstration in support of the DCNA was held at Fairfax Hospital. By 6:00 a.m., the Union proponents had positioned themselves in groups at the main entrance, as well as at ancillary entrances, to the Hospital. In its entirety, the Union demonstration lasted almost 14 hours.

The Union demonstrators, which included employees and also a significant number of non-employees and representatives of the DCNA, intentionally invited public attention to their activities by holding colored balloons, clustering in groups, carrying signs and stopping individuals and vehicles entering and exiting the Hospital's campus and interior parking lots. During the demonstration, Union demonstrators stood on or immediately adjacent to Fairfax Hospital property.

Having no prior experience with union demonstrations, the Hospital had no idea what might occur on May 5, 1989. Faced with such uncertainty, the Hospital had serious concerns that the continuity of patient care would be disturbed and that access to the Hospital would be blocked by the Union rally. After careful consideration, the Hospital decided that it would be advisable to document the demonstration.

Accordingly, the Hospital videotaped portions of the demonstration for a total of approximately thirty minutes and fewer than 30 still pictures were taken. The majority of the photo-

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operating and recovery rooms, treatment rooms; sitting rooms on patient floors accessible to and used by patients; elevators or stairways used frequently to transport patients; and locker areas adjacent to patient care areas.

graphing coincided with times of peak patient and employee ingress and egress at the Hospital — shift changes and lunch — periods during which unlawful union activity would be particularly disruptive.

The Off-Duty Access Rule

In September of 1988, the Hospital implemented an off-duty access policy. The policy, which prohibited off-duty employees from being on Hospital grounds (including the exterior portions of the campus and parking lots) for non-Hospital-related purposes, was in response to the increasing number of reports of assaults, thefts and vandalism during 1986 and 1987, the ongoing threat to the safety of the Hospital's employees and visitors, and the need for a solution to the employee parking dilemma.

Fairfax Hospital, as an acute care hospital, operates on a 24-hour basis. In a normal day, the Hospital is visited by approximately 8,000 people including employees. The Hospital maintains 1800 parking spaces scattered around the perimeter of the Hospital which encompasses approximately 43 acres. Two parking garages, one with 495 spaces and the other with 80 spaces, also are located on the Hospital's campus and are reserved for visitors, accommodating around 1,000 cars per day. The vast size of the physical plant together with the constant flow of people creates numerous safety, security, and parking concerns for the Hospital.

Procedural History

During 1989 and 1990, the DCNA filed a series of unfair labor practice charges with the Board alleging various violations of the NLRA by Fairfax Hospital. The Board issued a consolidated complaint on May 1, 1990, alleging that Fairfax Hospital had violated Section 8(a)1) of the Act, 29 U.S.C. §158(a)(1), by promulgating and selectively enforcing various Hospital rules. In an order dated June 4, 1992, an Administrative Law Judge

("ALJ") held, among other things, that the Hospital violated Section 8(a)(1) by promulgating and selectively enforcing the off-duty access rule, by engaging in unlawful surveillance relating to the May 5, 1989 demonstration and by selectively enforcing the no-solicitation/no-distribution rule ("no-solicitation rule").[2] On January 29, 1993, the Board affirmed the decision of the ALJ. App., *infra*, at A-27 - A-28.

The Hospital appealed the Board's order to the Fourth Circuit Court of Appeals. The Board filed a cross-application for enforcement of its order. The DCNA filed an Intervenor's Brief in support of the Board's position. On December 8, 1993, the court of appeals granted enforcement of the Board's order in all respects. App. *infra*, at A-2.

In its opinion, the court of appeals declared the Hospital's no-solicitation rule to be overbroad and thus in violation of Section 8(a)(1) because the Hospital's supervisors engaged in antiunion solicitation and distribution in areas designated as patient care areas under the rule. App., *infra*, A-20 & n.11. The court of appeals made its ruling despite the fact that, in the decision below, the ALJ had specifically declared that the Hospital's rule was legal as drafted. App., *infra*, at A-70.

Further, despite citing to the Supreme Court's holding in *NLRB v. United Steelworkers of Am., CIO (Nutone, Inc.)*, 357 U.S. 357 (1958), that an employer does not violate the Act by engaging in antiunion solicitation of its own, the court of appeals affirmed the Board's holding that the Hospital's antiunion solicitation in areas barred to prounion solicitation violated Section 8(a)(1). App., *infra*, at A-20 - A-21. According to the court, the antiunion solicitation by Hospital supervisors in banned

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[2] The court of appeals erred in its description of the ALJ's ruling in this regard. App., *infra*, at A-17. Although the court of appeals held the no-solicitation rule to be invalid, the ALJ and the Board both found the rule to be valid in its promulgation. The ALJ's opinion is set forth in the Appendix, *infra*, A-37 - A-86.

areas demonstrated that the no-solicitation rule was not necessary to lessen disruption to patients and, therefore, did not meet the "justification" requirement set forth in *Beth Israel v. NLRB*, 437 U.S. 483 (1978). *Id.* at A-20.

The court of appeals also concluded that the Hospital's surveillance of the Union demonstration was unlawful, ignoring Petitioner's argument that the Fourth Circuit should apply the principles set forth in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 891 (1992), to protect the Hospital's right to observe and photograph nonemployee demonstrators on or near its property. App., *infra*, at A-26.

The Court also did not apply *Lechmere* to the issue of whether the Hospital's off-duty access rule violated the Act. The court of appeals summarily affirmed the Board's finding that the Hospital's reasons for extending the ban against off-duty access to the parking areas on the Hospital's campus did not meet the "business justification" exception set forth in *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976). In so doing, the court of appeals rejected Petitioner's argument that the "business justification" exception set forth in *Tri-County*, as currently being applied by the Board, does not give sufficient deference to the property rights of employers when faced with intrusion by non-employees and off-duty employees alike.

REASONS FOR GRANTING THE PETITION

It has been 36 years since this Court visited the issue of an employer's right to engage in antiunion solicitation and its effect on the validity of no-solicitation rules directed at employees. In *NLRB v. United Steelworkers of Am., CIO (Nutone, Inc.)*, 357 U.S. 357 (1958), the Court made it very clear that an employer's Section 8(c) right to free speech should not be limited by the operation of a no-solicitation rule for employees. Writing for the Court, Justice Frankfurter rejected any claim by the union

that it should be "entitled to use a medium of communication simply because the employer is using it." *Id.* at 364.

As will be explained more fully below, the Fourth Circuit's decision to penalize Fairfax Hospital's use of antiunion supervisory solicitation by invalidating the Hospital's no-solicitation rule is in direct conflict with the principles set forth in the *Nutone, Inc.* decision. This case is important because the Board apparently views the Fourth Circuit's decision as a mandate for invalidating supervisory solicitation by other hospitals. In its motion for publication of the Fourth Circuit's decision filed on December 14, 1993, the Board suggests that the court of appeals opinion clarifies the weight which should be given by courts of appeals to a hospital's antiunion solicitations in prohibited areas. A copy of the Board's motion is included in the Appendix, *infra*, A-89 - A-91. The Board eagerly embraces the Fourth Circuit's interpretation of *Nutone, Inc.* and *Beth Israel* and it is clear that the General Counsel will continue to attempt to invalidate no-solicitation rules whenever employers engage in solicitation which may be in contravention of rules intended to apply only to employees. The Board characterizes the question presented in this petition as one of "continuing public interest", App., *infra*, A-90, and describes the court of appeals reasoning as "provid[ing] considerable guidance ... to future litigants". *Id.* at A-91.

The significance of the Fourth Circuit's refusal to apply *Lechmere* to the surveillance and no-access issues also merits the attention of this Court. The Board and the Fourth Circuit have both adopted a very narrow view of *Lechmere* which is in conflict with the principles set forth in the Court's decision. In effect, the court of appeals' decision and the Board's enforcement practice with respect to the Section 7 rights of employees would give deference to the property rights of employers only when there is a blatant trespass by nonemployee union organizers who are acting alone. Where nonemployee union organizers

join with employees to demonstrate on the employer's property or when a union uses off-duty employees to accomplish their trespassory activities, the Board and the Fourth Circuit apparently will not apply *Lechmere*. This is contrary to the interpretation given *Lechmere* by the Sixth Circuit Court of Appeals which dismissed the Board's challenge to a hospital's surveillance of solicitation by a non-employee union organizer in the hospital's cafeteria. *See Oakwood Hosp. v. NLRB*, 983 F.2d 698 (6th Cir. 1993). This continuing conflict as to the proper application of *Lechmere* is an issue which should be resolved by the Supreme Court.

No-Solicitation Rules Do Not Constrain Employers

During the Union's organizing campaign, the Hospital enforced its no-solicitation rule for employees while admittedly allowing its supervisors to engage in antiunion solicitation and distribution of literature. In so doing, the Hospital was merely exercising its statutorily protected right under Section 8(c) of the Act. The Fourth Circuit ruled, however, that the Hospital's exercise of its statutory right invalidated the no-solicitation rule and also provided evidence that the rule's prohibition on solicitation/distribution in immediate patient care areas was unjustified. The court of appeals' decision is contrary to long standing Supreme Court precedent.

Section 8(c) of the NLRA grants to employers the right to express non-threatening and non-coercive statements and views during a union organizing campaign. Specifically, Section 8(c) provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof [by an employer], whether in written, printed, graphics, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act, if such expression contains no threats of reprisal or force or promise of benefit.

29 U.S.C. §158(c).

The statutory right of free speech during union organizing campaigns was expressly acknowledged by the Supreme Court in its 1958 decision, *NLRB v. United Steelworkers of America of Am., CIO (Nutone, Inc.)*, and reemphasized again in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). In *Nutone*, the Court stated that an employer may engage in non-coercive antiunion solicitation; "indeed, his right to do so is protected by the so-called 'employer free speech' provision of § 8(c) of the Act." 357 U.S. at 362. The breadth of this right was underscored when the Court stated that even though employee no-solicitation rules had the effect of closing off one channel of communication;

> [T]he Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to the use of a medium of communication simply because the employer is using it.

357 U.S. at 363-64. (citations omitted).

The Court's decision in *Nutone* establishes that while Section 8(c) may result in a employer utilizing a greater spectrum of communication modes than available to employees, such a result does not mean that an employer must relinquish its Section 8(c) rights in order to "balance the playing field" and allow employees access to all avenues of communication.

The scope of an employer's free speech rights as embodied in Section 8(c) was explored once more by the Court in *Gissel Packing Co.* where the Court explained that Section 8(c) implements the First Amendment's free speech right in the labor-management arena. Moreover, the Court ruled that "an employer's free speech right to communicate his views to his

employees is firmly established and cannot be infringed by a union or the Board." 395 U.S. at 617. Thus, the Court's prohibition against infringement of the employer's free speech rights is unequivocal, absent a showing that the employer's actions over-stepped the specific limitations proscribed in Section 8(c).[3]

The principles established in *Nutone* and *Gissel Packing Co.* have stood unchallenged for over thirty-six years. Indeed, the Court's rulings have been the very foundation for NLRB holdings that employee no-solicitation rules are not binding on the antiunion campaign conduct of employers. *St. Francis Hosp.*, 263 N.L.R.B. 834, 835 (1962), citing *Nutone*; *Summitville Tiles, Inc.*, 300 N.L.R.B. 64 (1990), citing *Gissel Packing Co.* Employers can engage in antiunion solicitation in areas where the employees' actions are circumscribed by a no-solicitation rule because those rules act as a restraint only on the organizational activities of employees. *St. Francis Hosp., supra.*

Despite the uniformity with which the Board and the other circuit courts have enforced the right created by Section 8(c), the Fourth Circuit held that Fairfax Hospital's expression of its non-threatening and non-coercive opinions through its supervisory personnel had somehow invalidated the no-solicitation rule. App., *infra*, at A-20 - A-21. In reaching this conclusion, the court of appeals sought to penalize Fairfax Hospital's exercise of 8(c) rights while circumventing the legal principles established in *Nutone* and *Gissel.*

The Fourth Circuit's decision, if allowed to stand, will be used to attack the exercise of free speech rights by other employers during union organizing campaigns. Employers will find that the free speech guarantee in the Act is meaningless and any

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[3] The record is devoid of any evidence that the Hospital's expression of its opinions was outside the permissible boundaries of Section 8(c).

solicitation by supervisors that is outside the parameters of a facially valid solicitation/distribution rule for employees will invalidate the rule and allow unbridled solicitation by employees without regard to the injurious effect such solicitation will have on patient care. In effect, the Fourth Circuit's decision will decimate the free speech rights of employers and grant to employees greater communication rights than dictated by this Court's interpretation of Section 8(c).

Lechmere Recognizes And Protects The Hospital's Right To Observe And Photograph Union Demonstrations On Or Near Its Property

In *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), the Supreme Court reaffirmed and clarified existing law which holds that the organizational rights of a union do not take precedence over the private property rights of an employer. By summarily rejecting Petitioner's argument that the Hospital was within its rights to observe and photograph the May 5, 1989 Union demonstration, the court of appeals sets a course for the Fourth Circuit which is contrary to *Lechmere* and the application given that case by other courts. Indeed, the decision is in direct conflict with a decision by the Sixth Circuit, *Oakwood Hosp. v. NLRB*, 983 F.2d 698 (6th Cir. 1993), and a prior decision of the Fourth Circuit, *NLRB v. Southern Md. Hosp. Center*, 916 F.2d 932 (4th Cir. 1990).

In *Lechmere*, the Supreme Court ruled that the Board is not permitted to engage in a balancing of the Section 7 interests of employees against the property rights of the employer to protect "reasonable" trespasses by non-employees. 112 S.Ct. at 848. Explaining its earlier decision, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Court emphasized that non-employee organizers are permitted access to an employer's property only where "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels". *Id.* Consequently, the Su-

preme Court ruled that Lechmere did not violate the Act by prohibiting solicitation by non-employee union organizers in its parking lot. *Id.* at 850.

The United States Court of Appeals for the Sixth Circuit applied *Lechmere* to a hospital's surveillance of solicitation by a non-employee union organizer in the hospital's cafeteria. In *Oakwood Hosp. v. NLRB*, 983 F.2d 698 (6th Cir. 1993), the court of appeals considered the validity of a no-solicitation rule prohibiting non-employees from entering or remaining on hospital property to solicit employees. A union organizer began openly soliciting employees in the hospital's cafeteria. *Id.* at 700. During visits to the hospital by the union organizer, the hospital instructed its supervisors to keep track of the union organizer's activities, who he was talking to, and if he was in any other areas of the hospital. *Id.* at 700-01.

Recognizing that *Lechmere* draws a "clear line beyond which organizational rights of a union may not take precedence over the property rights of the employer", the Sixth Circuit concluded that "by inviting the public to use an area of its property, the employer does not surrender its right to control the uses to which that area is put." *Id.* The court stated that because the hospital had the right to bar the union organizer from its property, it certainly had the right to observe his activities while he was there. *Id.* at 703.

In this case, the Board and the Fourth Circuit did not extend Fairfax Hospital the same right to observe DCNA organizers as they demonstrated on the Hospital's property on May 8, 1989. By failing to give application to the "clear line" drawn by *Lechmere*, the Fourth Circuit not only creates a conflict between circuit courts which should be resolved by this Court, but it also provides a regional arena for the NLRB to continue to protect union organizing rights at the expense of employer property rights. The result is that employers within the Fourth Circuit

cannot be certain of their property rights despite the Court's pronouncements in *Lechmere*.

In this case, the court of appeals should have thoroughly analyzed the surveillance issue according to the principles laid down in *Lechmere* before affirming the Board's finding of a Section 8(a)(1) violation. The Hospital's property rights extend to its building, parking lots and grounds. The Union demonstration on May 5, 1989 had the potential for disrupting the delivery of health care as well as violating the Hospital's property rights. This is not simply a case where a court of appeals has given a new interpretation to a Supreme Court opinion. Instead, the Fourth Circuit simply refused to apply *Lechmere* to a factual situation which clearly cried out for its application. Thus, even without the circuit conflict that now exists, this case clearly warrants review and provides the Court with an opportunity to ensure that the entire scope of the principles set forth in *Lechmere* are given proper application by the Board and the courts of appeals.

Off-Duty Employees Should Not Be Afforded Full Section 7 Rights Without Due Consideration For The Employer's Private Property Rights

The Board has stated that the status of an off-duty employee "is more nearly analogous to that of a non-employee, and [therefore] he is subject to the principles applicable to non-employees". *GTE Lenkurt, Inc.*, 204 N.L.R.B. 921, 921-22 (1973). Consequently, off-duty employees should not be provided the same Section 7 rights as employees. The property rights of the employer must be weighed in any determination of the validity of off-duty access rules under the Act. *Id.*

Recognizing the distinction between off-duty employee rights and employee rights, the Board has adopted a "business justification" standard for determining the validity of no-access rules which prohibit off-duty employee access to employer parking lots and parking garages. *Tri-County Medical Center*,

222 N.L.R.B. 1089 (1976). In applying this standard, however, the Board engages in a balancing of the Section 7 rights of off-duty employees against the property rights of the employer which all too often affords too much weight to the Section 7 rights. *Id.* In light of the Supreme Court's decision in *Lechmere*, this type of balancing is inappropriate. The review should focus not so much on the reasonableness of the Hospital's business justification for the off-duty access policy but on whether there are other means available for the off-duty union supporters to communicate their message to other employees.

It is clear that neither the Board nor the court of appeals properly balanced the degree of restraint on the off-duty employees' communication rights against Fairfax Hospital's legitimate concern for regulating access to certain areas of its property. The Supreme Court's decision in *Lechmere* instructs the Board to give paramount consideration to an employer's property rights when dealing with a claim by non-employees that they have been denied access. If, as the Board has held, the rights of off-duty employees are more analogous to non-employees than employees, the private property rights of employers must be given more deference than what is currently afforded employers by the Board's *Tri-County* standard.

The Board's *Tri-County* standard has never been reviewed by the Supreme Court yet it affects thousands of employers across this nation. This case affords the Court the opportunity to bring the Board's rule for dealing with off-duty employee access in tune with *Lechmere*, the Court's standard for non-employee access. The necessity for a uniform standard of access is created by the fact that union organizing is seldom carried out only by non-employee union organizers but, as in this case, by union officials acting in concert with employees and off-duty employees.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 25, 1994

APPENDIX

UNPUBLISHED

United States Court of Appeals
For the Fourth Circuit

Fairfax Hospital

Petitioner,

v.

National Labor Relations Board

Respondent,

District of Columbia Nurses Association

Respondent-Intervenor.

No. 93-1272

National Labor Relations Board

Petitioner,

v.

Fairfax Hospital,

Respondent.

No. 93-1467

On Petition for Review and Cross-application for Enforcement of an Order of the National Labor Relations Board.

Argued: September 30, 1993
Decided: December 8, 1993

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and WILKINSON and HAMILTON, Circuit Judges.

Enforcement granted by unpublished per curiam opinion

COUNSEL

ARGUED: Paul M. Lusky, KRUCHKO & FRIES, McLean, Virginia, for Petitioner. Nancy Barbara Hunt, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent. **ON BRIEF:** John G. Kruchko, KRUCHKO & FRIES, McLean, Virginia, for Petitioner. Jerry M. Hunter, General Counsel, Yvonne T. Dixon, Acting Deputy General Counsel, Nicholas E. Karatinos, Acting Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Howard E. Perlstein, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent, Douglas Taylor, Martin P. Hogan, GROMFINE & TAYLOR, P.C., Washington, D.C., for Intervenor.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Fairfax Hospital (Fairfax or Hospital) appeals the [January 29, 1993] order of the National Labor Relations Board (the Board) charging Fairfax with unfair labor practices. The NLRB has cross-applied for enforcement of the order. Adopting the order of the Administrative Law Judge (ALJ), the Board concluded that Fairfax violated the National Labor Relations Act (the Act), Section 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3). For the reasons stated herein, enforcement of the Board's order is granted.

I

A. Background Facts

In the summer of 1988, the District of Columbia Nurses Association, American Nurses Association (Union), after being

contacted by registered nurses (RNs) at the Hospital, began an organizing campaign, which led to the formation of the Fairfax Professional Nurses Association (FPNA). Nurses from various units of the hospital composed the steering committee of the FPNA. The FPNA contacted the Union and affiliated with it.

After the Hospital learned of the organizing effort in September 1988, it pursued a policy of interfering with the Union's ability to promote itself. In response to the organizing campaign, the Hospital pursued two approaches. Besides promulgating new rules, the Hospital proceeded to enforce existing rules differently than it had in the past.

B. The Rules

1. The Bulletin Board Rule

One of these rules, in effect since 1984, concerned the posting of materials on hospital bulletin boards.[1] Until the fall

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1 This rule provided as follows:

STATEMENT

Bulletin boards located at various places throughout the organization are for the official use of Fairfax Hospital Association. However, each facility may designate one bulletin board for employees' use within stated parameters.

GUIDELINES

A. *Bulletin Boards*: All bulletin boards of the Association are restricted to the posting of Association-designated documents and notices.

B. *Employee Bulletin Board*: Each facility may designate one bulletin board for the use of employees. Employees will be permitted to post personal announcements, such as car-pool information, for-sale advertisements, and apartment sharing. Commercial notices, for example, advertising for real estate agencies, political notices, church events, and other such solicitations are prohibited.

Items to be posted must be delivered to the facility personnel office for approval prior to posting. The size of the announcements may not exceed 3" x 5." Notices may be posted for a period not exceeding one calendar week. Notices

of 1988, most of the nurses were unaware of the rule because it had previously been almost completely ignored. After the Hospital discovered the organizing drive, however, Lloyd Greene, the Hospital's Assistant Administrator for Human Resources, met with supervisors and supervisory nurses and advised them to enforce the rule.

The rule was not applied uniformly. Although the rule required prior approval for all postings, nurses rarely sought approval from the personnel office before placing nonhospital-related postings on the board. In particular, testimony established that employees constantly posted, without prior approval, notices and sign up sheets for various parties, baby showers, luncheons, and happy hours; sales of gift wrapping paper, Girl Scout cookies; Avon products; shoes; and cars. The supervisors removed the nurses' Union-related postings, but they allowed "social" postings to remain.

2. The Mailbox Rule

In mid-February 1989, RN Kathleen Eisenhauer placed copies of a Union meeting flyer in nurses' mailboxes. Operating Room Nurse Coordinator Rosalie Ewing removed the flyers from the mailboxes and informed Eisenhauer that solicitation and this type material were not allowed in the hospital. None

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found on the Employee Bulletin Board without approval of the personnel office will be removed immediately.

Posted material found anywhere other than the designated bulletin board will be removed immediately.

C. *Special Requests*: Special requests for authority to post notices of events in the community by charitable groups, various professional associations and the like shall be submitted to the Director of Personnel. The Director of Personnel will convey the request to the facility Vice President/Administrator for consideration. Normally, only those requests to post notices which involve health, medical, patient care or similar subjects may be approved.

(J.A. 46-47)

of the nurses had heard of this "Rule." In prior years, nurses had used the mailboxes for any correspondence which they wished to share with others, including personal telephone messages, Christmas and birthday cards, thank-you notes, invitations to showers and parties, notices of sales of Avon products and Girl Scout cookies, photographs, videotapes, and raffle tickets.

On March 3, 1989, the Hospital promulgated the following new rule:

> The internal mailboxes for employees are the Hospital's property. These mailboxes are made available to facilitate in-house communication on matters directly related to Hospital operations and practice. Therefore, material concerning outside matters, such as picnics, fund raising, etc., may not be placed in the mailboxes.
>
> Only hospital-related material that a Department Head or his/her designee, places in the in-house mailboxes is permitted. Any written material that is not hospital-related or is placed in the mailboxes by someone other than a Department Director/Nursing Coordinator will be removed form the mailboxes. Any employee who is found to violate this policy will be subject to disciplinary action.

(J.A. 1287). Even after this rule was promulgated, the nurses continued to receive nonhospital-related material in their mailboxes; however, the only items ever removed were Union literature.

3. The Personal Appearance Policy

The next rule of relevance in this case is the Hospital's personal appearance policy. The Hospital had a rule since 1986 which permitted the wearing of "[p]rofessional pins . . . or those authorized by Administration," but prohibited the wearing of other "pins, badges, insignia, buttons, signs, etc." (J.A. 53).

This policy was rarely enforced. RNs wore a variety of buttons such as Redskins' buttons, Christmas buttons, humorous buttons, and National Nursing Day buttons.

On April 17, 1989, the Union distributed to it supporters a button which read, "Nurses: Let's Work Together, FPNA/DCNA" (J.A. 54). The pin showed clasped hands. The same day, the Hospital promulgated and distributed to employees the following new rule:

> All Association employees must wear an authorized name tag while on duty. Only professional pins, service pins may be worn in immediate patient care dress [sic].

Id. Starting that afternoon, the Hospital informed the nurses that they could not wear their Union buttons and that the policy against the wearing of unauthorized buttons would be strictly enforced. Further, the Hospital warned the nurses that any violation of the policy would necessitate disciplinary action. The policy was enforced immediately. Some nurses were given formal warnings—the first step in the Hospital's positive disciplinary process—for wearing the buttons. Other nurses were instructed to remove their buttons immediately.

The prohibition against all nonconforming buttons did not last long. Nurses soon returned to wearing a variety of buttons, including Redskins' buttons, teddy bears, and holiday pins. The prohibition against Union buttons continued, however, and employees seen wearing Union buttons were ordered to remove them.

4. The Off-Duty Access Rule

The Hospital also promulgated an "Off-Duty Employee Access Rule"[2] in the fall of 1988 after the organizing campaign

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[2] STATEMENT

Off-duty employees are not allowed to return to, or to enter, the Hospital's physical property or premises unless to visit a patient, receive medical treatment or to conduct hospital-related business.

began. The Hospital, however, failed to follow its normal method for disseminating the new rule to employees. Typically, the Hospital advised employees of new rules by issuing a memorandum; it also placed new policies in communications and policy books which were maintained in the various units and were announced by the nursing coordinators at staff meetings. Here, the Hospital did neither.[3]

Most of the nurses, with some expectations, were unaware of the existence of the rule. RN Jan Hylton found out about the rule in mid-October 1988 when she returned to work while off duty to distribute some information about collective bargaining. Hylton knew about the solicitation policy which permitted solicitation in certain areas during nonworking time; she did not know about the off-duty access rule. Director of Surgical Nursing, Karen Lemieux directed Hylton to the staffing office to read the new off-duty policy. Although the Hospital usually did not post policies in that office, Hylton found the Off-Duty Access Rule posted there. The next day, the rule appeared in the unit communications and policy books for the first time. Other nurses testified that they first discovered the rule when they saw it posted later in November 1988, or when they saw it lying on a table after it had been posted in the summer of 1989. Some nurses did not learn of the rule until they heard about it from the nurses disciplined in April 1989, *see infra*.

GUIDELINES

A. An off-duty employee is defined as an employee who has completed his/her normally scheduled shift.

B. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

C. Special exceptions to this policy will require the *prior* approval of the appropriate assistant/associate administrator and the director of personnel.

(J.A. 1992)

[3] Although Fairfax contends that it placed its new no-access rule in the policy books, the rule was never announced at staff meetings.

On April 20, 1989, RNs Eisenhauer, Muller, and Dorothy Vasilcheck distributed Union leaflets. Muller was on a public sidewalk; Eisenhauer and Vasilcheck were leafletting in parking lots of the Hospital. Security guards approached all three of the nurses, asked them what they were doing, and wrote down their names. Shortly thereafter, Mary Jane Mastorovich, Associate Director of Nursing, told Eisenhauer and Vasilcheck that they were not allowed to distribute leaflets. Eisenhauer responded that, according to the solicitation rule, they were in the correct place. Mastorovich then asked Eisenhauer whether she had worked that day. When Eisenhauer replied that he had not, Mastorovich said that she was in violation of the no-access rule and again asked her to leave. Although both nurses refused to leave, they remained only ten more minutes.

The following day, Fairfax gave the three nurses written warnings, each of which stated that it constituted the second phase of the disciplinary process. The warnings indicated that additional violations could lead to further disciplinary action. Neither Eisenhauer nor Vasilcheck had ever been disciplined before.

While scrupulously enforcing the no-access rule against nurses who returned to participate in Union activity, the Hospital declined to enforce the rule against nurses who returned to the Hospital to participate in other activities. Off-duty nurses continued to return to the Hospital without incident to attend baby showers, parties, luncheons, social, and athletic events; to pick-up products they had purchased; to conduct business in the credit Union; and to use the Hospital's library.

5. The Solicitation and Distribution Rule

Fairfax also applied its solicitation and distribution rule to thwart the efforts of the Union. Since November 1986, the Hospital had a policy prohibiting employees from soliciting or distributing literature for any purpose during working hours on

hospital premises. The rule specifically prohibited solicitation in patient care areas.[4] The Hospital did not restrict solicitation by off-duty employees in cafeterias, lobbies, gift shops, lounges, locker rooms, rest rooms, and parking lots. The rule noted that disciplinary action would result from noncompliance.

The Hospital did not strictly enforce the rule. For instance, the rule did not restrict solicitation in the Hospital's cafeteria, but the rule prohibited solicitation in the meeting room adjacent to the cafeteria. Nevertheless, numerous "social" activities[5] were held in this room, and discipline was never imposed. Moreover, employees were never disciplined for selling and advertising a variety of products throughout the Hospital in open view of patients in specifically prohibited areas.[6]

Even though the rule allowed solicitation and distribution in the nurses' lounges during nonworking hours, nurses were warned not to distribute prounion literature there. In fact, Nursing Coordinator Jonathan Hurwitz told RN Tina Price that she was not allowed to bring any Union literature into the hospital. On the other hand, while the Hospital allowed nonunion material to remain posted in the lounges, any Union material was quickly removed.

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[4] Patient care areas included patient rooms; operating and recovery rooms; nurse's stations; rooms where patients receive treatment, such as treatment rooms of the emergency department, radiology, and therapy rooms; corridors adjacent to patient rooms, operating and recovery rooms, treatment rooms; sitting rooms on patient floors accessible to and used by patients; elevators or stairways used frequently to transport patients; and locker areas adjacent to patient care areas.

[5] These activities included book sales, shoe sales, and craft fairs.

[6] The following items, among others, were sold in patient care areas: Tupperware, Avon products, Girl Scout cookies, candy bars, citrus fruit, Easter baskets, flowers, plants, tote bags, T-shirts, Christmas cards, wrapping papers and ribbons. (J.A. 105-06, 146-50, 340-41, 398, 400-02, 699-702, 724-25, S.A. 84, 101, 164).

In addition, the Hospital published numerous antiunion posters for bulletin boards; it also printed smaller versions for handouts. Some of these were titled "The Truth About Unions" or "Why Fairfax Nurses Oppose the Union." The Hospital, without being specific about when or where the material should be handed out, advised the nursing coordinators to make sure that every nurse received a copy of the antiunion literature. (J.A. 174-76). Nonetheless, the Hospital distributed the antiunion literature in the very patient care areas where the rule prohibited solicitation and distribution of any kind.[7] For example, RN Becky McFadden handed out the flyer *The Truth About Unions* at the nurses' stations. (J.A. 141-45). RN Janet Courtemanche was given antiunion material at the nurses' station while she was on duty in the Coronary Care Unit II (J.A. 692); RN Garrity admits distributing antiunion material at the nurses' station. (J.A. 1042-44). None of these incidents resulted in discipline.[8]

In contrast, any distribution of prounion literature in prohibited areas resulted in discipline. For example, on December 4, 1989, Nursing Coordinator Director Marianne Heberer suspended for one day of "decision-making leave" RNs Vasilcheck and Vicki Herman for violating the rule. (J.A. 22). The incident resulting in discipline occurred during the night shift on November 13-14. Vasilcheck and Herman went into the cubbyhole, a small open area off the nurses' lounge, and an area where nurses would regularly take their break on the night shift, despite the fact that it was also used by the nurses for charting and documentation work, paging people, and making phone calls. RN Tracy Maslyn, who was pregnant, was charting in the cubby-

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[7] Numerous witnesses testified to this fact. Several of the witnesses who admitted handing out the material in patient care areas were witnesses for the Hospital. (J.A. 1042-44, 1135-40, S.A. 23-24).

[8] On one occasion, however, a nursing coordinator asked some nurses to leave the nurses' station and return to an area off the nurses' lounge so that patients would not overhear their antiunion discussion. (J.A. 1020).

hole. After engaging in a conversation about maternity benefits, Vasilcheck and Herman asked Maslyn whether she would be interested in reading about the Union. When Maslyn responded affirmatively, Herman gave her a Union authorization card and flyer. The conversation ended, and all three returned to work. Vasilcheck then noticed that Maslyn had left the Union literature where she had been sitting; she brought the literature to Maslyn, who was standing near the nurses' station, and told her to take the information to read later. When Herberer eventually heard about the conversation and the distribution of Union material, the disciplinary decision-making leave followed.

Ironically, the Hospital participated in the same type of distribution for which Vasilcheck and Herman were disciplined. Several months later, on March 1, 1990, RN Heberer gave Vasilcheck one of the Hospital's antiunion flyers in the same cubbyhole, while Vasilcheck was charting. (J.A. 436-39). Again, no discipline resulted.

C. The Surveillance

Besides promulgating and disparately enforcing new rules, Fairfax responded to the Union's organizing efforts with surveillance. From 5:30 a.m. to 7:30 p.m. on May 5, 1989, approximately thirty nurses and other Union supporters distributed packets of Union materials around the perimeter of the Hospital. Some of the supporters were carrying balloons, but none wore signs. The Hospital knew in advance that Union activity had been planned: at 2:00 a.m. on May 5, the Hospital had been made aware of some Union literature which stated that nurses, who would be standing on county sidewalks and roads adjacent to Hospital entrances, were going to hand out authorization cards and other literature.

Lloyd Greene, the Hospital's Assistant Administrator for Human Resources, hired photographers to photograph and videotape the participants. Greene, along with Tim Klagholz, the

Hospital's Director of Media Services department, and the photographers, drove around the Hospital premises taking pictures for about an hour. Many of the pictures were made with telephoto lenses, often at the direction of Greene, who pointed out the specific leafleteers he wanted photographed. Klagholz and one of the other photographers returned later in the day to make more photographs and videotapes. Greene also stationed a video camera at the Hospital's main entrance to tape the leafleteers. Moreover, the Hospital's security guards were instructed to observe the leafletting all day. Nursing Directors Kathleen Garrity and Karen Lemieux also rode in other vehicles in order to observe the Union activity.

D. The Discharge of Kitty Richardson

Finally, the Hospital discharged RN Katherine (Kitty) Richardson on March 8, 1990. Richardson, who had twenty-seven years' experience as an RN, sixteen of these years at Fairfax, worked as a certified staff RN in the hemodialysis unit at the Hospital. She was also the sole nurse in her department certified in nephrology. During her tenure with Fairfax, Richardson received consistently excellent evaluations which often rated her performance as "superior" and "outstanding." After being strongly recommended for a promotion to the Clinical Ladder, her promotion to Clinician III had been approved. In her sixteen years with the Hospital, Richardson had been neither disciplined nor counseled. Fairfax nominated her for "Outstanding Nurse of the Year" in 1988. That nomination, which praised her public speaking, her positive influence on her peers, and her role as a patient advocate, went to the Virginia State Nurses Association. Besides retaining membership on the Hospital's protocol committee, Richardson did extensive teaching at the Hospital in the areas of hemodialysis and nephrology.

In the spring of 1989, Richardson announced her support for the Union in a Union flyer distributed outside the Hospital. The flyer contained a prounion quote from Richardson and a

photograph. She then joined the FPNA's steering committee, a group of approximately 20 nurses active in the organizing efforts from various departments in the Hospital. As a member of the steering committee, Richardson spoke about the Union, attended meetings, and distributed flyers outside the Hospital. Mastorovich, Toni Ardabell—the Director of Medical, Psychiatric and Dialysis Nursing—and Kathleen Garrity—the Director of Critical Care and Surgical Nursing—observed Richardson while she was leafletting.

On the morning of March 7, 1990, while on a break in the break room, Richardson, fellow nurse Linda Ensign, and their supervisory nursing coordinator Terri Booth, were discussing an antiunion poster the Hospital had posted. Janet Steuber, another nurse, overheard parts of the conversation.

The poster in question, which had been posted in the break room and in other locations throughout the Hospital, such as the nurses' bathroom, was part of the Hospital's series of posters on "Why Fairfax Nurses Oppose the Union." This particular poster detailed an ugly event in which an operating room nurse allegedly told a patient that he would not receive good medical care because his wife refused to support the Union.

In the conversation between Richardson and Booth in the break room, Richardson told Booth that she doubted the truthfulness of the poster and stated that in all her years of nursing she had never seen conduct like that described in the poster. Booth responded that she believed the poster. Richardson then questioned Booth about the reasons for hanging the poster in the nurses' bathroom in addition to posting it on the bulletin board. Booth replied that the Hospital owned the entire facility and could post its material wherever it wished. Richardson responded that prounion nurses should also be able to post their notices in support of the union.

The break was nearing an end. When Richardson and Ensign got up to leave, Booth commented to them that the

Hospital's posting was unpleasant for everyone and that the situation would probably worsen. Booth stated, "You better get used to it because there will be a lot more of these things coming." (J.A. 67). Richardson replied that Booth could expect "retaliation." *Id.* During the conversation, Richardson's voice was "firm" and "a little louder than ordinary conversation," but she did not scream or approach Booth, raise her arms, "or anything." (J.A. 1234-35).

That same morning, Booth informed Ardabell about her conversation with Richardson and told her that Richardson had threatened her with "retaliation." After assuring Booth that she would discuss the matter with Mastorovich, Ardabell told Booth that she would get back in touch with her. The same day, Mastorovich met first with both Booth and Ardabell together, then with Ardabell separately. Although Mastorovich concurred with Ardabell's recommendation that Richardson be fired, Mastorovich instructed Ardabell to speak with Ensign.

Later that afternoon, Ensign met with Ardabell and Booth. Ensign described the entire conversation and emphasized that the whole discussion was about an antiunion poster. She stressed that Richardson never yelled during the encounter. Moreover, she commented that she did not believe that Richardson had used the word "retaliation" to threaten Booth. In fact, Ensign stated that she did not believe that Richardson would threaten anyone. She added that she did not think Richardson had threatened Booth.

During the meeting, Ardabell composed a statement for Ensign's signature. At first, Ensign refused to sign the statement because she disagreed that it accurately reflected the events of the Richardson/Booth conversation. Eventually, Ensign signed a revised statement because, she contends, she felt pressured to sign something and did not feel free to leave the room until she did so.[9]

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[9] The contents of the statement are as follows:

Ardabell again met with Mastorovich after meeting with Ensign. Ardabell incorrectly told Mastorovich that Ensign had confirmed Booth's version of the events. Mastorovich, agreeing with Ardabell's continued recommendation of termination, approved Richardson's termination without speaking to Richardson. In making her decision to discharge Richardson, however, Mastorovich did consult with Charles Barnett, the Hospital's Chief Operating Officer, Brent Miller, Vice-President for Human Resources, and the Hospital's legal counsel. Barnett and Mastorovich decided to terminate Richardson the next day for threatening Booth with unspecified retaliation.

When Richardson arrived at work the next day, March 8, 1990, at around 8:00 a.m., she changed into her work clothes. Ardabell located her and escorted Richardson from her locker to the office of Lou Segner, Manger of Employee Relations and Training. Ardabell informed Richardson that Booth had approached her the day before and had accused Richardson of threatening her. After Richardson related her recollection of the break room conversation with Booth and Ensign, Ardabell stated that Richardson had threatened Booth with retaliation. Richardson then rolled her eyes and attempted to explain that she had used the word "retaliation" in reference to other postings that the Union might make. Responding that Booth had a different impression of what had transpired, Ardabell discharged Richardson. Segner then requested Richardson to turn

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1. There was an emotional conversation about posting of hospital posters vs. what Kitty wanted to post.

2. Kitty Richardson—got highly emotional.

3. The emotion may be due to anger or frustration, I'm not sure. She was venting.

4. There was a 10 minute conversation in which Kitty Richardson's emotional state escalated.

5. I heard something to the effect of you will see some retaliation. (J.. 1502).

over her identification badge and keys to her unit. Ardabell and Segner accompanied Richardson back to her unit to clean out her locker and escorted her out of the Hospital.

At around 9:00 a.m., Ardabell made an announcement to the staff nurses in Richardson's unit that Richardson had been terminated. Several moments later, Steuber told Ardabell that if Richardson had been fired for the comment she had heard her make to Booth the previous day, Steuber did not consider the statement either threatening or a basis for discharge. Ardabell made no response.

The Hospital's disciplinary system, established in 1986, was in effect at the time that Richardson was discharged. The policy set forth three categories of employee violations. Category A violations[10] mandate the use of the positive discipline system. For Category A violations, the steps in the process are: (1) factfinding, (2) oral reminder, (3) written reminder, (4) decision-making leave, and (5) planned discharge.

The only violations which can result in immediate discharge are Category B violations. These include theft, use or possession of alcohol or controlled substances while on duty, assault and battery, possession of a dangerous weapon, abuse in caring for a patient, and unauthorized disclosure of confidential information. Even for a Category B offense, however, and employee must first be placed on suspension without pay while the Hospital conducts an investigation before the employee can be discharged.

Category C violations, which include reduced attendance or productivity deriving from physical or mental disability, result in appropriate referral for treatment or assistance.

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[10] These violations include "tardiness, absenteeism, poor work performance, disregard for sanitation and safety rules, failure to follow instructions, procedures or standards, disruption of the routine of others, improper care of equipment and hospital property and inappropriate behavior towards patients, guests, employees and physicians." (J.A. 1329).

The consolidated complaint in this proceeding alleges that, when District of Columbia Nurses Association, American Nurses Association (Union), began to organize the registered nurses employed by Fairfax Hospital, the Hospital instituted or began to enforce no solicitation, no distribution, no access, no buttons, no posting, and mailbox rules, some disparately, in order to prevent and frustrate the Union from organizing. The Union was the charging party before the Board. The complaint alleged that the above-referenced rules violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). In an order dated June 4, 1992, the ALJ found that the Hospital violated Section 8(a)(1) of the Act by adopting and disparately enforcing its bulletin board posting rules, mailbox policies, and employee "button" rules.

The ALJ also held that the Hospital violated Section 8(a)(1) of the Act by promulgating and selectively enforcing the off-duty access rule; by promulgating and selectively enforcing the solicitation and distribution rule; and by engaging in surveillance of employees' Union activities. As to the discharge of RN Katherine Richardson, the ALJ determined that the Hospital violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by terminating her because of her Union activities. The Hospital appealed all of the above findings to the Board.

On January 28, 1993, the Board, adopting the ALJ's order, affirmed the decision. The Board's order required the Hospital to rescind disciplinary warnings issued to numerous employees because of their Union activities; to rescind its rules prohibiting distribution of literature in employee mailboxes and the access of off-duty employees to Hospital property; to rescind its revised personal appearance polity to the extent that it prohibits Hospital employees from wearing Union insignia on their uniforms; to offer employee Richardson immediate and full reinstatement to her former position, and to make her whole for any loss of earnings or other benefits she suffered as a result of the discrim-

ination against her; and to post an appropriate notice indicating compliance with the above order.

The Hospital appeals the Board's order as to the off-duty access rule; the solicitation and distribution rule; the Hospital's surveillance activities; and the discharge of Richardson. It does not appeal the determinations regarding the bulletin board rule; the mailbox rule; or the personal appearance rule. The Board filed a cross-application for enforcement of its order. The District of Columbia Nurses Association has filed an Intervenor's Brief in support of the Board's position.

II

If the Board's findings and conclusions are supported by substantial evidence taken from the record as a whole, the reviewing court should not disturb the Board's order. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Kiawah Island Co.*, 650 F.2d 485, 489 (4th Cir. 1981); Act § 10(e), 29 U.S.C. § 160(e). We must uphold a Board's conclusions of law if based upon a reasonably defensible construction of the Act. *NLRB v. United Food & Commercial Workers, Local 23*, 484 U.S. 112 (1987). A reviewing court "may not displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488. *See ARA Leisure Servs., Inc. v. NLRB*, 782 F.2d 456, 459 (4th Cir. 1986); *NLRB V. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985). Whether the findings of fact are supported by substantial evidence is a question of law for the court to decide. *Universal Camera*, 340 U.S. at 491.

III

Section 8(a)(1) of the Act, 29 U.S.C. §(a)(1), makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights to join or support Union activities. We evaluate the coercive or intimidating

nature of the employer's actions under the totality of the circumstances. *See Nueva*, 761 F.2d at 965. In light of the above standard, we affirm the Board's conclusion that the Hospital violated Section 8(a)(1) of the Act by disparately enforcing its solicitation and distribution rule.

Under Section 8(c) of the Act, employers have the legal right to express their views concerning a Union's organizing efforts so long as the opinions do not involve threats or coercion. An employer does not violate the Act by enforcing a valid no solicitation rule pertaining to on-duty employees while engaging in antiunion solicitation of its own. *NLRB v. United Steelworkers of Am., CIO (Nutone, Inc.)*, 357 U.S. 357, 362 (1958); *Lutheran Hosp. of Milwaukee*, 224 NLRB 176, 181 (1986), *modified on other grounds*, 569 F.2d 208 (7th Cir. 1977).

Employees, however, also have "the right to self-organization and collective bargaining established by [Section 7] of the Act. [This right] necessarily encompasses the right of employees effectively to communicate with one another regarding self-organization on the job site." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492 (1978). Generally, employers cannot adopt rules prohibiting solicitation or distribution on nonworking time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 (1945). In the context of a hospital, however, the Board has permitted more restrictions on employee solicitation and distribution because of problems with disruption of patient care. For example, a hospital may ban all solicitation and distribution in immediate patient care areas. A rule, however, that prohibits distribution or solicitation on nonwork time in nonworking areas is presumptively invalid unless the hospital demonstrates that the prohibition is necessary to avoid disruption of health care operations or disturbance of patients. *Beth Israel*, 437 U.S. at 491. The rule cannot be overly broad. *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 781 (1979). The hospital bears the burden of proving that the prohibition is necessary to lessen disruption

to patients. *Id.* at 507. *See Southern Maryland Hospital*, 916 F.2d 932 (4th Cir. 1990) (enforcing order requiring Hospital to allow distribution and solicitation at entrance doors in early morning hours).

The Hospital contends that the Board erroneously held that the Hospital's antiunion solicitation in areas barred to prounion solicitation violated Section 8(a)(1). We disagree. The Hospital's antiunion solicitation in areas barred to Union sympathizers[11] indicates that the Hospital never needed to apply the rule in those areas. If the Hospital had merely allowed noncontroversial solicitation, such as Tupperware sales, in these areas, a different result may, but not necessarily, have been dictated. In light of the Hospital's antiunion activity in banned areas, however, the hospital has not met its burden of proving that the prohibition on solicitation is necessary to lessen disruption to patients. *See Beth Israel*, 437 U.S. at 507. In other words, the Hospital's no solicitation/distribution rule does not meet the "justification" requirement set forth in *Beth Israel*: the hospital knew that no disruption of patient care would occur from solicitation in banned areas, such as the nurses' stations. Consequently, because the Hospital's rule violates Section 8(a)(1) of the Act, we cannot allow the Hospital to continue excluding prounion solicitation in the previously forbidden areas.

The Hospital also takes issue with the Board's finding that it allowed employees to solicit for and distribute materials about numerous activities in "banned" areas while disciplining Union organizers for the same behavior. Claiming that all of these other solicitations were hospital related, the Hospital argues that

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[11] Although it is unclear from both the ALJ's and the Board's opinion whether the Hospital actually engaged in *antiunion* solicitation and distribution in patient care areas and in other banned areas, a closer examination of the record indicates that the Hospital did participate in these antiunion activities in both areas. (J.A. 141-45, 146-50, 174-76, 308-18, 436-39, 656-58, 679-80, 692-93, 705, 738, 1020, 1042-44, 1135-40, 1189-90; S.A. 23-24).

they cannot be relied upon to support an allegation of disparate enforcement. *Rochester Gen. Hosp.*, 234 NLRB 253, 259 (1978). We disagree. As the Board points out, the Hospital mischaracterizes the evidence: the Hospital allowed the sale of many nonhospital-related commercial products including Avon, Tupperware, and Girl Scout Cookies, in banned areas. Moreover, nurses were told to cease bringing Union material to the building; others were prohibited from distributing Union material in nurses' lounges, even though the rule allowed distribution in nurses' lounges. These prohibitions did not apply to non-union products and activities.

Therefore, the Hospital's maintenance and enforcement of its no solicitation/no distribution rule violated Section 8(a)(1) of the Act. By its actions, the Hospital demonstrated there was no need for the rule. More importantly, the Hospital disparately applied the Rule. Thus, the Board's decision regarding the Hospital's no solicitation/no distribution rule merits enforcement.

IV

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." Thus, an employer violates Section 8(a)(3) and (1) of the Act by discharging an employee for engaging in activities in support of union representation. *See, e.g., N.L.R.B. v. Frigid Storage, Inc.*, 934 F.2d 506, 509-10 (4th Cir. 1991); *Salem Leasing Corp. v. N.L.R.B.*, 774 F.2d 85, 89 (4th Cir. 1985). Section 8(a)(3) and (1) violations are subject to a two-tiered analysis. First, an employee may not be discharged for engaging in conduct protected by Section 7.[12] *Leasco, Inc. v. N.L.R.B.*, 289 NLRB 549 n.1 (1988). To remove conduct from

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[12] Section 7 of the Act grants employees the "right to self-organize, to form, join, or assist labor organizations, . . . and to engage in other concerted

the protection of the Act, a court must find the conduct to be "egregious" or "of such a character as to render the employee unfit for further service." *Id.* at 549. The Board employed this standard in the instant case to find the conduct protected. *See Brunswick Food and Drug*, 284 NLRB 661, 665 (1987), *enforced mem.*, 859 F.2d 927 (11th Cir. 1988).

Even if the employee's conduct is not protected, however, a discharge motivated by antiunion animus violates the Act. *Nueva Eng'g* 761 F.2d at 966. Under this tier of the test, the employee must establish two elements: (1) that antiunion animus was a substantial factor in the discharge, *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 400 (1983) and (2) that the discharge would not have occurred but for the antiunion animus. *Id.* at 976. *See Wright Line*, 251 NLRB 1083 (1980), *enforced as modified*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 91982); *approved in Transportation Mgmt Corp.*, 462 U.S. (1983).

Under *Wright Line*, once a court finds antiunion animus to be a motivating factor, the burden shifts to the employer to prove by a preponderance of the evidence that the discharge would have occurred even without the protected conduct. *Transportation Mgmt. Corp.*, 462 U.S. at 400-03. *Accord Salem leasing Corp.*, 744 F.2d at 87-88; *NLRB v. Daniel Construction Co.*, 731 F.2d 191, 197 (4th Cir. 1984). Motive is usually the main question to be resolved. *N.L.R.B. v. Hale Container*, 943 F.2d 394, 398 (4th Cir. 1991). Because the question of motive is a question of fact, we cannot disturb the Board's determination unless it is not supported by substantial evidence based on the record as a whole. *Nueva Eng'g*, 761 F.2d at 968. Applying

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activities for the purpose of collective bargaining or other mutual aid and protection." 29 U.S.C. § 157. A violation of § 8(a)(3) includes a derivative violation of § 8(a)(1). *Metropolitan Edison Company v. NLRB*, 460 U.S. 693 (1983).

this standard, we affirm the Board's finding that Richardson's discharge violated section 8(a)(3) and (1) of the Act.

The Hospital's argument against the Board's finding of a violation is two-fold. First, it asserts that Richardson's conduct was unprotected. In the alternative, the Hospital argues that the discharge was not motivated by animus. We consider each argument in turn.

A

Contending that the Board incorrectly employs an "egregiousness" standard to find Richardson's activity protected, the Hospital argues that Richardson's speech does not fall within the bounds of protected activity. We disagree. In *Leasco*, the Board upheld the egregiousness standard for distinguishing conduct which the Act would not protect. 289 NLRB 549 (1988). The cases cited by the Hospital do not prove otherwise. *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Golden Nugget, Inc.*, 215 NLRB 50 (1974). In fact, *Golden Nugget* predates numerous cases employing the "egregiousness" test. *See Brunswick Food*, 284 NLRB at 665; *Postal Service*, 250 NLRB 4 (1980).

The Hospital also relies on *Atlantic Steel* to argue that Richardson's conduct was unprotected. We find no merit in this argument. In *Atlantic Steel*, the Board set forth several factors for determining when an employee's conduct is sufficiently severe to lose the protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. 245 NLRB at 816.

Although the *Atlantic Steel* Board held that a shop steward's use of profanity towards his supervisor removed him from the protection of the Act, *id.* at 814, that case is distinguishable from the instant case. The obscenity directed at the foreman in that case was completely unprovoked and occurred on the

production floor during the employee's working time. *Id.* at 816. In contrast, Richardson's remark did not involve profanity, was provoked by conversation about the Union, and was uttered on her break. Thus, even applying the factors from *Atlantic Steel*, Richardson's statement does not lose the protection of the act.

B

In its alternative argument, the Hospital challenges the Board's holding that, even if Richardson's conduct were unprotected, the Hospital still violated the Act because antiunion animus motivated the discharge. We find this argument to be without merit.

Fairfax first argues that the Board erroneously relied on the Hospital's other Section 8(a)(1) violations to find antiunion animus. The Hospital contends that such circumstantial evidence may be used only where violations are egregious. This argument is unpersuasive. We have held that "motive is a question of fact" and that "the Board may infer discriminatory motivation from either direct or circumstantial evidence." *Nueva Eng'g*, 761 F.2d at 967. *See also Frigid Storage*, 934 F.2d at 510 (finding retaliatory motive from numerous uncontested violations); *American Thread Co. v. NLRB*, 631 F.2d 316, 321 (4th Cir. 1980); *Gencorp*, 294 NLRB 717 n.1 (1989). None of these cases limits circumstantial evidence of motive to egregious violations.

Moreover, because motive is a question of fact, we must accept the Board's finding of antiunion animus if there is substantial support for it on the record as a whole. *Salem Leasing*, 774 F.2d at 89. In this case, substantial evidence of an antiunion motive exists: Richardson had an exemplary employment record, sixteen years of experience at the Hospital, and consistently excellent evaluations. Yet she was fired, without warning, for her retaliation comment made during a conversa-

tion about the Union. Consequently, we will not disturb the Board's finding of antiunion animus.

Next, the Hospital argues that, even if the General Counsel has established a prima facie case of antiunion motivation, the Hospital has proven by a preponderance of the evidence that Richardson would have been fired anyway. Pointing to its "good faith belief" that the retaliation comment was a severe threat, the Hospital contends that Richardson would have been discharged for her remark regardless of antiunion sentiment.

The Board, however, adopted the ALJ's credibility determinations that the reason advanced by the Hospital for Richardson's discharge was not credible[13] and that, in any event, the Hospital "failed to follow its own progressive discipline policy in its discharge of Richardson"[14] (J.A. 82). Considering Richardson's exemplary record, her noted Union activity, and the Hospital's failure to follow standard disciplinary procedure, we must conclude that substantial evidence exists to support the

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[13] The ALJ and the Board found the Hospital's witnesses who testified to the good faith belief in the severity of the threat and to the severity of Nurse Booth's reaction to be insincere. (J.A. 109).

Credibility determinations are conclusive unless a clear preponderance of all the relevant evidence shows they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951).

[14] The Hospital's written policy provides for factfinding, oral and written reminders, and a day of decision-making leave prior to discharge. Even for serious offenses warranting immediate discharge, the policy provides that the employee will be suspended while the facts of the offense and the appropriate discipline are fully investigated.

Clearly, the Hospital did not follow its standard procedure in terminating Richardson. Although the Hospital argues that it terminated other employees without following its standard procedure, none of these situations is analogous to the instant case. All of the other incidents involved either violent behavior—knives and physical fighting—or repeat violations coupled with direct refusal to follow instructions.

Board's conclusion that the Hospital's explanation for Richardson's discharge was mere pretext.

Therefore, the Hospital's discharge of RN Richardson violated Section 8(a)(3) and (1) of the Act. Richardson's activity was protected. Even if it was not, the evidence establishes that antiunion animus motivated the discharge. Consequently, because we find that substantial evidence on the record as a whole supports the Board's findings, the Board's order is enforced with respect to Richardson.

V

The Hospital raises numerous arguments in an attempt to prevent enforcement of the Board's order with respect to the Hospital's surveillance of Union activities and the Off-Duty Access Rule. We find that the Hospital's contentions are without merit. Accordingly, we also grant enforcement as to these portions of the Board's order.

VI

We find that substantial evidence exists to support the Board's finding of violations of Section 8(a)(1) and (3). Accordingly, enforcement of the NLRB's order is granted.

ENFORCEMENT GRANTED

United States of America
Before the National Labor Relations Board

Fairfax Hospital, A Division of Inova Health Systems and Fairfax Health System, Inc.

and

District of Columbia Nurses Association, American Nurses Association

Cases 5-CA-20387, 5-CA-20468, 5-CA21042, 5-CA-21048

DECISION AND ORDER

On June 4, 1992, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the General Counsel filed a cross-exception and a supporting brief. The Respondent filed reply briefs[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,[2] and has decided to affirm the

[1] As requested by the General Counsel in a motion filed October 21, 1992, alleging failure of service by the Respondent, we note that, under Sec. 102.47 of the Board's Rules and Regulations, copies of all motions in proceedings before the Board must be accompanied by an affidavit of service upon the parties.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

judge's rulings, findings,[3] and conclusions as modified[4] and to adopt the recommended Order.[5]

We agree with the judge's finding that the discharge of Kathryn (Kitty) Richardson violated Section 8(a)(3) and (1) of the Act. We do so for the following reasons.

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[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent asserts that the judge's decision is biased. After a careful examination of the entire record, we are satisfied that the allegation is without merit.

We note that the judge mistakenly stated that Vicki Herman testified. We correct this inadvertent error but find that it makes no difference in the result in this case.

We agree with the judge that an employer may lawfully campaign during employee's nonbreak time and in working areas even though it prohibits employees from doing so. Thus, we do not rely on any implication in pars. 33 and 59 of the judge's decision that the Respondent's exercising its right to solicit and distribute flyers directly affects the Union's right to solicit and distribute.

[4] The General Counsel has excepted to the judge's failure to find that the Respondent violated Sec. 8(a)(3) as well as Sec. 8(a)(1) of the Act by requesting its nurses to remove their union buttons. The General Counsel bases his argument on the judge's finding that the Respondent's requests to its nurses to remove its buttons were a form of discipline. We find that the requests to nurses Jan Hytton, Catherine Meister, Elaine Muller, and Joan Whalen, which were documented in the Respondent's files, violated sec. 8(a)(3). We find it unnecessary to pass on whether the request to nurses Carol Awad, Lynn Baker, Janet Courtemancha, Brenda Craft, and Tina Price to remove their union buttons violated Sec. 8(a)(3) because these violations, if found, would be cumulative and would not materially affect the Order.

[5] The judge's recommended Order provides that the Respondent shall offer immediate and full reinstatement to discriminate Kathryn Richardson.

The credited facts, which are more fully set out in the judge's decision, are as follows. On March 7, 1990, nurse Kathryn Richardson, while in the break room during her break, engaged in a discussion with her supervisor, Terri Booth. Nurse Linda Ensign heard the entire conversation and nurse Janet Steuber heard part of the conversation. In what the judge described as "a heated discussion," Richardson protested the Hospital's posting and distributing its antiunion literature while prohibiting union supporters from posting and distributing union materials.

The poster and flyer, which were the immediate cause of the dispute, described an incident in which a patient on his way to surgery allegedly was told that he would not receive good treatment because his wife had refused to support the Union. During the conversation Richardson had challenged the truthfulness of the literature, stated that in all her years of nursing that she had never seen conduct such as that described in the literature, and questioned how Booth could believe such a thing. Booth commented that the hospital's posting was unpleasant, but stated that "you better get used to it because there will be a lot more of these things coming." Richardson replied that Booth could expect "retaliation." Booth reported the incident to her supervisors. Richardson was discharged the next morning.

The Respondent contends that Richardson was discharged for threatening Booth with "retaliation." Mary Jane Mastrovich, Respondent's assistant administrator for medical, surgical, critical care and operating suite nursing, testified that the decision to discharged Richardson was made on the afternoon of March 7, 1990, the day the incident occurred, and was made in consultation with Toni Ardabell (director of medical, psychiatric, and

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The Respondent argues that Richardson should not be reinstated because, inter alia, she expressed disloyalty to the hospital in a televised interview after her discharge. We leave it to the compliance stage of this proceeding to determine the effect, if any, of Richardson's alleged misconduct after her discharge.

dialysis nursing), Charles Barnett (chief operating office of Fairfax Hospital), Brent Miller (vice president of human resources, Inova Health Systems), and legal counsel. Ardabell corroborated Mastrovich's testimony that the decision to terminate Richardson occurred on March 7. When Richardson reported to work on the morning of March 8, Ardabell discharged her.

We find that Richardson was engaged in union activity during this conversation.[6] We also find that under the circumstances presented here, her entire conduct, including her statement about "retaliation," was protected. To be sure, an employee may lose the protection of the Act by threatening to engage in misconduct in retaliation for what is perceived as provocative (and even unlawful) conduct by an employer. But Richardson's reference to "retaliation," uttered in a heated exchange concerning the Respondent's unlawful enforcement of its no-solicitation/no-distribution and bulletin board rules, was inherently ambiguous. It could have meant no more than that the Union would respond in kind to the Respondent's propaganda. Unless accompanied by threats of egregious or outrageous conduct, Richardson's oblique statement was not unprotected.[7]

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[6] The Respondent in its brief argues that Richardson's conduct was not concerted. Because Richardson was engaged in union activity, we find it unnecessary to rely on the judge's finding that she was engaged in "concerted" activity. *Salem Leasing Corp. v. NLRB*, 778 F.2d 85, 89 fn. 8 (4th Cir. 1985).

We do not rely on the judge's statement, in par. 74 of his decision, that the literature that the Respondent posted and distributed was untruthful. The Respondent correctly states (at least in the context of this case) in its brief that "the truth or falsity of the [literature] is irrelevant to the issue of whether Ms. Richardson was discharged for her union activity."

[7] See generally *Brunswick Food & Drug*, 284 NLRB 663, 665 (1987), enfd. mem. 859 F.2d 927 (11th Cir. 1988); *Postal Service*, 250 NLRB 4 (1990); *NLRB v. Cement Transport*, 490 F.2d 1024, 1029-1030 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974).

The Respondent admits that it discharged Richardson for her use of the word "retaliation," activity which we have found to be protected by the Act. Accordingly, in discharging Kathryn Richardson because of the "retaliation" statement, the Respondent discharged her for her protected union activity in violation of Section 8(a)(3) and (1) of the Act.[8]

We find that *Atlantic Steel Co.*, 245 NLRB 814 91979), on which the Respondent relies, is distinguishable from this case. In *Atlantic Steel*, the Board deferred to an arbitrator's decision that the respondent had lawfully discharged for insubordination an employee who directed an obscenity to his foreman. The majority opinion emphasized that fact that the obscenity was unprovoked and was made on the production floor during the employee's working time. In addition to the procedural distinctions between Board review of an arbitral award under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and Board review of an administrative law judge's decision, *Atlantic Steel* is factually distinguishable from the present case. Richardson, the discriminatee here, was in the break room on her own time, engaged in a discussion with her supervisor regarding union related materials when she spoke of "retaliation".

[8] Member Oviat finds it unnecessary to decide whether Richardson's retaliation statement was itself protected. He relies instead on the pretextual nature of the discharge. Thus, Member Oviat notes that the general counsel made a strong prima facie case for finding that the Respondent violated Sec. 8(a)(3). Member Oviat observes that (1) Richardson had 27 years of experience, over 15 of these at the Respondent; (2) she had consistently excellent evaluations at the Respondent, was strongly recommended for promotion to the Clinical Ladder, and her promotion to Clinician III was approved; (3) Mastrovich, the supervisor who approved Richardson's discharge, had never received a negative report about her work; (4) despite the Respondent's particular difficulty in filling all its registered nurse positions, its positive discipline designed to give an employee an opportunity to improve her behavior before discharge, and the lack of specific evidence that a registered nurse had ever been discharged for just *one* incident of misconduct without prior warning or counseling, Richardson was summarily discharged just on the basis of her retaliation remark; (5) although there is ample record evidence, and the judge found, that under its disciplinary rules Respondent investigates alleged misconduct before imposing discipline, including speaking to the employee involved, Supervisor Ardabell recommended, and

Assuming arguendo the Richardson's conduct in using the word "retaliation" was not protected, we would still find that her discharge was unlawful under *Wright Line*.[9]

Mastrovich decided, to discharge Richardson without first speaking to either Richardson or to Steuber, another employee present during the Booth-Richardson conversation, and without Ardabell's even reviewing Richardson's personnel file; (6) the Respondent knew that Richardson was a leading union proponent who had been pictured and quoted in a union leaflet, herself had leafletted the Respondent's supervisors, and had questioned the Respondent's managers concerning the Union; (7) there is substantial evidence of the Respondent's antiunion animus, including numerous violations of Sec. 8(a)(1) and (3); among them its selective and disparate enforcement of its rule on the use of bulletin boards; (8) Richardson was discharged shortly after she objected to her supervisor about the fairness of the Respondent's antiunion campaign, including the inability or prounion nurses to post notices on the bulletin board.

Member Oviat observes that the Respondent's supervisors testified that Richardson was discharged just for her remark concerning retaliation. He notes, however, that the judge discredited these supervisors on the basis of their demeanor—the judge found that they were not sincere and that in fact they seized on the retaliation remark to rid themselves of an outspoken union supporter. The judge also found that, although Booth was upset, this stemmed from the substance of her entire conversation with Richardson, during which Richardson questioned Booth's single-minded loyalty to management. The Board will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence establishes that those resolutions are incorrect. *Standard Dry Wall Products*, supra; see *Abbot Laboratories v. NLRB*, 540 F.2d 662, 667 (4th Cir. 1976). In Member Oviat's view, the evidence will not support a reversal of those findings. Thus, like the judge, Member Oviat is constrained to find that the asserted reason for Richardson's discharge—her retaliation remark—was pretextual, and that the real reason was her union activity. Member Oviat emphasizes that his findings in this case should not be interpreted to mean that an employer could never summarily discharge an employee for suggesting "retaliation." As Member Oviat has concluded, however, the Respondent failed in its proof that the retaliation remark was the real reason for the discharge.

[9] 251 NLRB 1083 91980), enfd. as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 91983).

The General Counsel has established a prima facie case that the Respondent discharged Richardson for her union activity. It is undisputed that Richardson was known to the Respondent as a leading union advocate. She was a member of the Fairfax Professional Nurses Association steering committee, had handed out union leaflets in front of the hospital to members of management as well as to fellow employees, was one of six nurses whose picture and interview appeared in a union flyer, and her discharge was precipitated by a discussion of the union organizing campaign.

There is ample evidence of antiunion animus in the numerous 8(a)(1) violations which the Respondent committed in its attempts to discourage the nurses from organizing. Specifically, we find animus in the Respondent's disparately enforcing its bulletin board rule, in promulgating and disparately enforcing its mailbox rule, in confiscating union literature from employee mailboxes, in promulgating and disparately enforcing its rules restricting access of off-duty employees, in engaging in surveillance of its employees' union activities, as well as in disparately enforcing a no-solicitation/no-distribution rule.

Once the General Counsel has established that the Respondent knew of the discharged employee's union activity and that the Respondent has demonstrated antiunion animus, the burden shifts to the Respondent to show that it would have taken the same action in the absence of union activity. The Respondent has failed to do so.

Respondent's proffered rebuttal was that it had a good-faith belief that Richardson was threatening her supervisor with personal harm when she spoke of "retaliation." The Respondent's witnesses testified that they understood the word "retaliation" to mean that Richardson threatened Booth with physical harm. The Respondent argued that Richardson's statement was so threatening as to amount to an assault on her

supervisor, this justifying an immediate dismissal under the Respondent's personnel policy.

The judge, however, discredited the Respondent's witnesses' testimony, including testimony that Booth was hysterical because of Richardson's statement, and rejected this argument. In this connection, the judge specifically stated that the Respondent's witnesses "were not sincere" and "were not candid." Thus, the judge determined that the Respondent's witnesses did not have a good-faith belief that Richardson intended to harm Booth. The judge reasonably inferred that Booth was upset, not because of any threat, but because of the entire conversation. In these circumstances, the judge was warranted in concluding that the Respondent seized on "the word 'retaliation' to concoct a legitimate reason for discharging [Richardson], whereas all that was really involved was a deeply felt disagreement arising from the Hospital's opposition to the Union's attempt to organize the nurses."

Further, as the judge noted, the Respondent failed to follow its own progressive discipline in its discharge of Richardson. The Respondent's written policy generally provides for factfinding, oral and written reminders, and a day of decision-making leave prior to discharge. Even for serious offenses warranting immediate discharge, the policy provides that the employee will be suspended while the facts of the offense and the appropriate discipline are fully investigated. The Respondent clearly did not fully investigate this incident before deciding to discharge Richardson. The Respondent interviewed nurse Linda Ensign, who heard the entire conversation and testified, inter alia, that she was surprised that Booth thought Richardson's statement was threatening. Nurse Janet Steuber testified that she was in and out of the break room during the March 7 incident, that she heard part of the conversation including the comment about "retaliation," but that no one in hospital management asked her about the conversation prior to

Richardson's termination, or even after Richardson's discharge when she told Booth and Ardabell that she had heard the statement and that it was not threatening. Finally, the Respondent did not interview Richardson herself before making the decision to terminate her. This failure to investigate casts still further doubt on the Respondent's contention that it discharged Richardson because of its good-faith belief that she had threatened her supervisor with personal harm.

Respondent's witnesses testified that there are always positions open for registered nurses at Fairfax Hospital, that the hospital attempts to keep experienced nurses, and has even established an RN Retention Committee in its endeavor to do so. Kathryn Richardson, a nurse for 27 years, had been employed at Fairfax Hospital for over 15 years. She was certified in nephrology and hemodialysis. Richardson's evaluations dating back to 1976 were entered as exhibits in this proceeding. Her evaluations are consistently high and replete with references to her "superior" and "outstanding" performance, comments about her participation in hospital in-service and orientation programs, and a 1988 notation that she was nominated for the Virginia Nurses Association Outstanding Nurse of the Year Award because of her dedication to her profession. Yet, despite Richardson's years of efficient and dedicated service, and despite the hospital's ongoing need for experienced nurses, the Respondent precipitously discharged her.

We conclude that the Respondent has failed to show that it would have discharged Kathryn Richardson in the absence of her union activity. We agree with the judge that in discharging Kathryn Richardson, the Respondent violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fairfax Hospital, a division of Inova Health Systems and Fairfax Health System, Inc., Fairfax, Virginia, its officers, agents, successors, and asigns, shall take the action set forth in the Order.

Dated, Washington, D.C., January 29, 1993

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviat, Jr., Member

(SEAL) National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FAIRFAX HOSPITAL, a division of
INOVA HEALTH SYSTEMS and
FAIRFAX HEALTH SYSTEM, INC.,

and

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
AMERICAN NURSES ASSOCIATION

Carol A. Baumerich, Esq., of Baltimore, MD,
and *Angela S. Anderson, Esq.*, of Washington, DC,
for the General Counsel.

John G. Kruchko, Esq., Kathleen A. Talty, Esq.,
and *Steven W. Ray, Esq., (Kruchko & Fries)*,
of Vienna, VA, for Respondent.

Douglas Taylor, Esq., of Washington, DC,
for the Charging Party.

Cases 5-CA-20387, 5-CA-20468, 5-CA-21042, 5-CA-21048

DECISION

Findings of Fact and Conclusions of Law

BENJAMIN SCHLESINGER, Administrative Law Judge: The consolidated complaint in this unfair labor practice proceeding alleges that, when District of Columbia Nurses Association, American Nurses Association ("Union"), began to organize the registered nurses.[1] employed by Fairfax Hospital (the "Hospital"), Respondent instituted or began to enforce no-solicitation, no-distribution, no-access, no-buttons, and no-posting rules,

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[1] All the nurses referred to herein are registered nurses.

some disparately, in order to prevent and frustrate the Union from organizing. When nurses violated the rules, they were warned or otherwise disciplined. The complaint also alleges a variety of other violations of the National Labor Relations Act, 29 U.S.C. § 151 et seq., all of which Respondent denied.[2]

Jurisdiction is conceded, but the proper party respondent is not. The first complaint named the Hospital as the respondent, alleging that it was a Virginia corporation. The answer denied that the Hospital was a corporation, division of Fairfax Health System, Inc. ("System"), a Virginia non-stock corporation; that it operated a private non-profit community health care facility providing medical and professional care services to the general public in Fairfax, Virginia; and the during the 12 months preceding May 1, 1990, it derived gross revenues in excess of $250,000 and purchased and received goods, materials, and services valued in excess of $10,000 directly from points outside Virginia. The amended complaint continued to allege only the Hospital (not as a division) as the respondent, and the Hospital took the same position in reply. Only during the hearing did the General Counsel agree to amend the name of the Hospital, as the Hospital contended.

Late in the hearing , the Hospital called Brent Miller, the vice president, human resources, of Inova Health Systems ("Inova"), to testify about certain facts involving his participation in the decision to photograph a certain Union demonstration and to discharge nurse Kathryn ("Kitty") Richardson. Because Miller was not employed by System, but was intimately in-

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[2] The relevant docket entries are as follows: The Union filed its charge in Case 5-CA-20387 on April 17, 1989, and amended it on April 27 and November 17. It filed its charges in 5-CA-20468 on May 19, 1989, in 5-CA-21042 on March 13, 1990, and in Case 5-CA-21048 on March 15, 1990. The complaint issued on December 4, 1989 and was amended on May 1, 1990 and at the hearing. The hearing was held in Fairfax, Virginia, on various dates between May 15, 1990 and May 7, 1991.

volved in the Hospital's decision to conduct the surveillance and to discharge Richardson, the Counsel for the General Counsel justifiably inquired of Miller as to how he became involved in these matters. Millers stated that the Hospital was a division of Inova, a Virginia corporation, and not System of whose existence he professed ignorance. Counsel then moved to amend the consolidated complaint, a motion which I granted. to allege that Inova and System constituted a single employer within the meaning of the Act and were doing business as Fairfax Hospital; and that wherever the complaint made reference to Respondent, it meant these two entities. However, no motion was made to amend the caption, which still named the Hospital, as a division of System. It was only a result of the General Counsel's unopposed motion to amend the caption, as well as other portions of the Official Transcript, made after the hearing terminated, and hereby granted, that the caption now appears in its present form.

I find, but not without doubt, that the Hospital is a division of both Inova and System. Respondent's answer admitted that the Hospital was a division of System, and Miller stated that the Hospital was one of four hospitals which comprised the hospital division of Inova. Both Respondent's counsel and Miller are in a position to be fully aware of what the facts are. It was incumbent on Respondent to clear up whatever conflict might exist between the answer and Miller's testimony. Respondent offered no help. Although it might well be that the caption incorrectly designates the Hospital's affiliation with both, particularly System, the error, if any, is of the Hospital's making. The caption, describing the Hospital's status, is supported by this record.[3]

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[3] Respondent complains that the amendment of the complaint was extremely prejudicial and violated fundamental concepts of due process. As explained in the text, most of the information about the relationship of Inova to the Hospital was given by Miller, who was called as a witness by Respondent late in the hearing. As a result primarily of his testimony, the

I am unclear what the General Counsel believes is added by the allegation that both Inova and System, doing business as the Hospital, constituted a single employer. If the Hospital is a division of both, both are doing business as the Hospital and are responsible for any relief granted herein. At least, that is my intent. That finding is based almost wholly on the admission in the answer. Otherwise, except for some miscellaneous facts, the record supports the finding that Inova is the sole employer of the Hospital's employees. Inova owns the Hospital, at least, so testified Miller, contrary to what the answer admits. All employees' paychecks bear Inova's names, as well as the Hospital's. Many administrators of the Hospital have comparable positions within Inova's structure. Inova made the rules and policies (approved by Mike French, Inova's senior vice president) affecting labor relations which were binding on the Hospital and are the bases of many of the principal allegations in the complaints. Inova's policies require that the final authority for the discipline of nurses rests with Inova's president; and the discharge of Richardson was approved by Miller, who is not on the staff of the Hospital.

Other than some common officers, the record fails to define the function of System; but there is at least enough to show that System was not an innocent bystander and should not be exonerated from any liability which results from this proceeding.

Counsel for the General Counsel promptly moved to amend the complaint. In granting the amendment, I advised Respondent specifically that, in the event that it was unprepared to meet the allegation, it could apply to me for additional time to elicit testimony. Furthermore, after my ruling, there was a lengthy delay in the hearing, prompted by Respondent's failure to comply with a subpoena duces tecum which Respondent had unsuccessfully moved to quash. Clearly, Respondent had a right to contest that ruling in an enforcement proceeding in the federal district court, as it did, but there was a six-month hiatus in the hearing, during which it should have had ample opportunity to review its legal position and present its opposition to the amendment. I find that Respondent was not prejudiced, and its right to due process was not violated.

French, Inova's senior vice president, is its President. The Hospital's administrator, Everette Devaney, who was described by one witness as the "head" of the Hospital, is senior vice president of System and an employee of Inova. He reports to French, as do other members of the Hospital, but the record does not reveal whether he reports to French in his capacity as an officer of System or Inova, or both.

Whether employers are single employers involves the examination of four factors: "(1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). On the basis of the lack of evidence of the functional integration of operations of System and Inova and, particularly, what System does, I conclude that there is no proof of the relationship between System and Inova, and I find that they do not constitute a single employer; but I find that the Hospital is a division of both. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

In the summer of 1988 the Union began an organizing campaign, which led to the formation of the Fairfax Professional Nurses Association ("FPNA"), with a steering committee of nurses from various units in the Hospital. FPNA contacted the Union and affiliated with it. Respondent found out about the organizing campaign, and, in an effort to counter the Union's meetings, leaflets, and literature, some placed in the employees' mailboxes, others distributed in the parking lots, cafeteria, and lounges during off-duty time, Devaney held meetings with nurses to discuss their concerns and issued "Action Reports" describing these meetings. These meetings continued, as did the Union's efforts to organize, into 1989, and during this period

Respondent pursued a policy of attempting to silence the Union's message or of substantially interfering with its ability to promote itself, at least on the campus of the Hospital.

The first way that Respondent did this was by enforcing the following rule, in effect since 1984, to prohibit the posting of Union literature on its bulletin boards:

> STATEMENT
>
> Bulletin boards located at various places throughout the organization are for the official use of Fairfax Hospital Association. However each facility may designate one bulletin board for employees' use within stated parameters.
>
> GUIDELINES
>
> A. Bulletin Boards: All bulletin boards of the Association are restricted to the posting of Association-designated documents and notices.
>
> B. Employee Bulletin Boards: Each facility may designate one bulletin board for the use of employees. Employees will be permitted to post personal announcements, such as car-pool information, for-sale advertisements, and apartment sharing. Commercial notices, for example, advertising for real estate agencies, political notices, church events, and other such solicitations are prohibited.
>
> Items to be posted must be delivered to the facility personnel office for approval prior to posting. The size of the announcements may not exceed 3" x 5". Notices may be posted for a period not exceeding one calendar week. Notices found on the Employee Bulletin Board without approval of the personnel office will be removed immediately.

Posted material found anywhere other then the designated bulletin board will be removed immediately.

C. Special Requests: Special requests for authority to post notices of events in the community by charitable groups, various professional associations and the like shall be submitted to the Director of Personnel. The Director of Personnel will convey the request to the facility Vice President/Administrator for consideration. Normally, only those requests to post notices which involve health, medical, patient care or similar subjects may be approved.

In general, an employer has complete control of its bulletin boards and the items, if any, that it will permit to be posted on them. There is no statutory right of employees to use an employer's bulletin boards. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F. 2d 405 (8th Cir. 1983); *Container Corporation of America*, 244 NLRB 318 fn. 2 (1979), modified 649 F.2d 1213 (6th Cir. 1981). The complaint does not allege that Respondent's rule is illegal, nor does it allege that it was adopted for the specific purpose of thwarting any future union activities. What it does allege is that the rule was maintained and enforced selectively and disparately because Respondent removed Union-related solicitations and distributions, while it permitted the posting of nonunion-related solicitations and distributions for long periods of time, without the Hospital's approval and without compliance with any size requirements.[4]

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[4] The General Counsel repeatedly argues in his brief that Respondent posted its own anti-Union posters on the same bulletin boards that the employees were not allowed to post their pro-Union material. The point is irrelevant. Respondent had the right to post its literature without affording a similar right to its employees. *Summitville Tiles, Inc.*, 300 NLRB No. 9, slip op. at 9-10 (September 28, 1990).

The record amply supports the complaint. Nurse after nurse testified in relentless detail about the locations of the bulletin boards and what was posted on them. The Hospital's units — two on each floor of the Hospital's main building, the Tower Building, as well as other units — had as many as nine bulletin boards, and it is not particularly helpful or interesting to recite the locations of the boards or their general purpose. What is important is that Union-related literature, either announcements or propaganda, was removed from the bulletin boards within minutes or hours after posting. What was not removed from these same bulletin boards was not only Hospital-related material, which no one questions was entitled to remain, but other kinds of posters, notices, and writings which the Hospital had never objected to before the Union's organizing drive began and much of which was still posted even at the time of the hearing in this proceeding, such as birth announcements, cake sales, order forms for Girl Scout cookies and Tupperware, pizza-delivery and Chinese-food notices, baby shower invitations (where each nurse, and even supervisor, who planned to attend would sign the sheet and indicate what food she or he was going to bring, so that others would not bring the same food), announcements, happy hour parties, get-togethers, going-away parties, retirement parties, Christmas parties, comic strips, cartoons, posters for the Gold Cup horse race in Virginia, shoe sales, car sales, real estate rentals and sales, solicitations for "Sunshine Funds," postcards from staff who were on vacation, and thank-you's from patients. Some of these remained on the bulletin boards for days, some for weeks, and some even for months. Many far exceeded the size limitation imposed by the Hospital's rule, and the requirement of the Hospital's advance permission seems to have been totally ignored. Permitting the posting of all these personal items, while not permitting and removing only Union-related material, violates the Act. *Honeywell, Inc.*, supra; *Saint Vincent's Hospital*, 265 NLRB 38 (1982), enfd. in relevant part 729 F.2d 730 (8th Cir. 1984).

Among Respondent's defenses is that, for the most part, its rule was enforced. Indeed, some nursing coordinators testified that they always removed all material that was not Hospital-related, a rather curious admission in light of the rule's permission to post "personal announcements." In fact, in some of the Hospital's wings, there were bulletin boards labeled "Thank You's," "Good News Grapevine," and "Personal," just for the posting of the kind of material that the supervisors at the hearing were insisting that they were removing. I do not credit them. I find generally that the Hospital's witnesses supported whatever they thought the Hospital wanted to hear, rather than testifying truthfully.

In any event, most of the supervisors who testified that they enforced the rule, and the rule was not enforced uniformly throughout the Hospital, did not enforce it until the Fall of 1988, after the nurses began to look to the Union for help. Until then, the rule had been almost completely ignored. I credit those nurses who testified that they did not know about the above-quoted rule because, for years, they had posted material without permission from Respondent's administrators and managers and their material remained posted on the bulletin boards until it was so stale that it was removed by the nurses or their supervisors. It was only after the organizing drive was discovered that Lloyd Greene, the Hospital's assistant administrator for human resources, met with the supervisors and supervisory nurses and advised them to enforce the bulletin board rule. A number of nurses testified that the rule was first posted or inserted in the nurses "Read" file or announced at meetings of nurses only after the organizing drive began. Thus, even though the restriction on posting notices preceded the Union's organizing campaign, and even assuming that the rule was applied uniformly following the commencement of the campaign, Respondent's motive to enforce the rule was to stifle its employees' organizing activities and rendered the rule unlawful. *Ramada Inn of Fremont*, 221 NLRB 331 (1976).

But the rule was not applied uniformly. The instances testified to were no mere isolated exceptions.[5] Too many nurses testified about too many items posted; and I credit all of their testimony. Some of the material that was posted is in evidence, and there are photographs of the bulletin boards — all offering indisputable evidence that non-Hospital related material[6] was posted as a general course of conduct and that Respondent's supervisors permitted those notices to be posted and permitted them to remain, while removing all Union-related material. No one testified that Union material had been permitted to remain, as did all the other material. Respondent applied its rule disparately, on purpose. It took away the right of the nurses to communicate only about the Union, while it permitted the nurses to communicate freely about parties and food and vacations. The rule which required permission of the Hospital was never generally enforced, nor were any of its other prohibitions. Even when Respondent began to enforce the rule, albeit partially, the offensive material was not wholly eliminated from the nurses' attention. For example, instead of allowing a notice of a shower to be posted, the notice was merely removed from the bulletin board but allowed to remain on the table in the nurses lounge, within feet of the bulletin board from which it had been

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[5] Respondent contended throughout its brief that there should be no finding of certain unfair labor practices because the conduct complained of was too isolated or there were too few incidents of illegalities in a facility of the Hospital's size. I generally reject these defenses, first, because I find that the conduct was not isolated and, second, because all the conduct had a direct bearing on the nurses whose protected and union activities were being limited. In particular, the principal allegations have in common Respondent's attempt to discourage communications about the nurses. Evidence of any disparate treatment regarding any of the opportunities to communicate, whether by verbal solicitation, notices on bulletin boards, or leafletting by off-duty nurses, or by leaving a note in a mailbox, is material to all of the allegations.

[6] This finding includes materials advertising social functions, posted by professional associations.

removed. To the contrary, Union propaganda left on tables in lounges was uniformly and immediately removed.

Accordingly, I do not agree that the failure to enforce the rule was negligible and isolated in light of the rule's permission to post "personal announcement," a defense which appears illusory. If the Hospital wished to bar personal notices, it was obliged to enforce that rule and was obliged to have sufficient personnel monitor the boards to make sure that the prohibition was applied in an even-handed manner. The rights guaranteed employees by the Act cannot be forfeited by their employer's inaction or inattention. Nor do I agree with Respondent's contention that the announcements of "social unit-related activities" should be disregarded as evidence of disparate activity because they "have been shown to have a positive effect on team building, thereby improving the rendition of patient care." Parties may be places where nurses may share or exchange their work experiences, but nurses may also do so at union meetings. There is no reason why an announcement of one is any more helpful or harmful to patient care than the other. I conclude that Respondent violated Section 8 (a) (1) of the Act.

The complaint also alleges that the Hospital restricted the number of bulletin boards available for the employees to post their union literature, an allegation which make little sense because an employer does not have to make any bulletin boards available to employees. What was litigated was Respondent's relabeling of a bulletin board allegedly to eliminate the only board in that area available for Union material. Before November 1988, there had been only two bulletin boards, among many, which were labeled on the ground and basement floors in the Tower Building in the operating room area. One was labeled "Personal" and nurses used to be able to post their own private messages there. In November 1988, after Union adherents had posted their first Union literature, which was quickly removed, this bulletin board and others which had not been labeled were

relabeled with plaques which read "Official Minutes" or "Official Memos," "Laser Updates," "Educational Seminars", "Educational Literature," and "Quality Assurance." There was no longer a bulletin board labeled "Personal" and thus, according to the complaint, no longer a proper place to post union literature.

However, Respondent had never allowed union literature to be posted anywhere, and at best the proof shows only that Respondent removed a bulletin board where personal messages could be placed. On the other hand, at the same time, Respondent added two new boards in the basement and hallway leading to the basement nurses lounge. The first was labeled "Stat Staff Messages" and became the repository for the nurses' social messages, but the nurses also posted whatever they wanted on the frames of other bulletin boards, as well as bathroom stall doors and doors leading into the lounges and in the stairway. Thus, the effect of the labeling of the other bulletin boards was offset by the addition of the new boards. There was no discrimination here, and certainly no discrimination because of the employees' union activities or activities protected by Section 7. I conclude that Respondent did not violate the Act in this respect and will dismiss this allegation.

In mid-February 1989[7] the Union prepared flyers announcing a Union meeting to be held on February 23; and, a day or two before the meeting was to be held, nurse Kathleen Eisenhauer placed these flyers in the mailboxes[8] of the operating room nurses. They were removed by operating room nursing coordinator Rosalie Ewing, who advised that Eisenhauer was soliciting and that this type of material was not allowed in the hospital. If Eisenhauer had any questions, she should con-

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[7] All dates hereinafter refer to the year 1989, unless otherwise stated.

[8] The word "mailbox" in this discussion is used loosely. Many of the "mailboxes" were cubbyholes. Others were lateral letter files and manila file folders.

tact the Hospital's personnel office. About 10 days later, on March 3, Respondent promulgated the following new rule:

> The internal mailboxes for employees are the Hospital's property. These mailboxes are made available to facilitate in-house communication on matters directly related to Hospital operations and practice. Therefore, material concerning outside matters, such as picnics, fund raising, etc., may not be placed in the mailboxes.
>
> Only hospital-related material that a Department Head or his/her designee, places in the in-house mailboxes is permitted. Any written material that is not hospital-related or is placed in the mailboxes by someone other than a Department Director/Nursing Coordinator will be removed from the mailboxes. Any employee who is found to violate this policy will be subject to disciplinary action.

I reject Respondent's claim that the rule was not new. None of the nurses heard of or read the rule before, and Respondent never produced the prior rule. The practice of the employees before the issuance of the new rule was to use their mailboxes for any correspondence that they wished to share with others. That included union literature, one of which was disguised as a "shopping spree," Christmas and birthday cards, thank-you notes, invitations to showers and parties, telephone messages, Avon catalogues, correspondence from people on vacation, reminders for Girl Scout cookie sales, photographs, videotapes, raffle tickets, buttons, and cartoons. In addition, many nurses testified that they constantly received notices of course offerings, schedule changes, and correspondence and newsletters form other professional associations, such as the Association of Operating Room Nurses — none of which were "directly related to Hospital operations and practice." Nor were they placed in the mailboxes, as the rule required, by the "Department Head or

his/her designee." Even after the rule was promulgated, the nurses continued to place many of these in the mailboxes; but the only items ever removed were Union literature. (Some nurses testified, however, that, because of the promulgation of the rule and instructions given by their supervisors, they have not used the mailboxes to distribute Union-related material.)

The complaint alleges that this rule was promulgated in order to discourage union and protected activities and was applied disparately. My conclusion is similar to my resolution of the complaint's bulletin board allegation. Respondent's rule was enforced as a direct result of the attempt by the employees to engage in union activity. Respondent feared that the employees would communicate with one another by notices on the bulletin board and wanted to stop that practice. Thus, the bulletin board rule was enforced to prevent the employees from posting any Union-related notice in the Hospital. When the employees attempted to spread word of their organizing efforts by using the mailboxes, the Hospital learned that it had no rule preventing that practice; and so it promulgated the rule shortly after the Union's attempt to disseminate its notice of its upcoming meeting. The timing if the rule supports an inference that the real reason for the rule was an illegal one, to prohibit the dissemination of union material.

Greene's explanation of the reason for the rule's enforcement was hazy and unsatisfactory. He testified that many nursing coordinators and directors had inquired about what could appropriately be placed in the mailboxes. There was no explanation of what was bothering them, and it appears more than coincidental that the nurses had just recently begun their efforts to organize. The fact that Eisenhauer had attempted to inform her fellow nurses of a meeting must have been threatening. As a result, this new rule was publicized in a memorandum Greene addressed to all employees. The directors and nursing coordinators were required to post the memorandum, and the

directors were ordered to remove from the mailboxes anything placed there in violation of the new rule. Respondent's maintenance and selective enforcement of its new rule was thus disparate and violated Section 8(a) (1) of the Act. It follows that Ewing's confiscation of the Union flyers from the mailboxes on February 21 or 22 also violated the Act.

Respondent claims that this violation cannot be remedied, because permitting the employees to place flyers in the internal mailboxes would violate the federal Private Express Act, 18 §§ 1694, 1696. This is the first time that the Hospital had been worried about that Act. Until the adoption of its rule, Respondent freely distributed its material in these mailboxes, and employees and professional associations distributed their material, too. Respondent was concerned not about the method of distribution, but the contents of what was being distributed. Furthermore, the record is barren of any evidence that, even if the Private Express Act applied, the Hospital operated an internal mail system within the meaning of that statute. *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988), dealt with a university's refusal to allow a union to use the internal mail system to send unstamped letters to certain of the university's employees. Here, however, certain employees were merely delivering leaflets by inserting them in open slots or in file folders and never sought to use any mail system. My recommended order will not, in any event, require Respondent to deliver anything. Respondent simply may not adopt rules to thwart union activity, and it must only afford the same rights to those who favor the Union as it does to all its other employees.

The complaint next alleges that nursing coordinator Sue Corbett violated Section 8(a) (1) in three respects when she talked with nurse Elaine Muller on February 23. Muller's testimony was as follows: Corbett told her that it had been reported to her that Muller had been passing out Union literature,

and Corbett accused Muller of putting Union material in employees' lockers. Muller denied putting anything in lockers but admitted handing out an article form *The American Journal of Nursing*, a professional journal. Corbett asked Muller why she would be interested in joining the Union. Muller replied that she was interested in seeing the nurses take charge of their own profession. Corbett asked, if Muller thought there were problems, why she needed to pay money to the Union and why she could not discuss the problems directly with the Hospital's administrators. Muller replied that the nurses were very busy in their profession and that the Union was the best organization to represent the nurses. In addition, Muller said that the administrators had been in charge of hospitals for the last 15 or 20 years; they had ended the employment of nurses aides and licensed practical nurses and expected nurses to do everything from nursing to paperwork and cleaning floors, whereas nurses should be at the bedside; and the only result of their administration was that capable nurses had left the profession. It was time for the nurses to do something about it. Corbett then asked why Muller thought that the operating nurses knew about what was happening "over here in the building" and then pointed her finger at Muller, saying: "I'm warning you, you better be careful, I'm warning you, they know who you are and they're watching you" Muller said that she was not disciplined during this conversation. Later, however, on April 24, she was given a written warning for distributing Union flyers in a parking lot and was told that she was in the second phase of Respondent's disciplinary procedure, because she had previously been warned on February 23.

The complaint alleges that the "warning" constituted both a warning of unspecified discipline and giving Muller the impression that her activities were being watched. Corbett specifically denied that she said the words attributed to her in the above quotation, but testified that she warned Muller for soliciting an on-duty staff nurse and distributing union materials to that nurse

at the nurses station. Corbett's testimony makes sense for two reasons: first, Muller seemed to know exactly what she was being warned about. She testified, in an answer that was not wholly responsive to the question posed: "Well, I distinctly remember the incident she was referring to. I had been on 9 East and asked them to (read the article), that this was an interesting article from the AJN and asked them to read it." In a letter of May 3, Muller acknowledged that Corbett had "accused [her] of passing union material while on duty." I find it improbable that Corbett should have warned her not about this incident, but about putting material in lockers. Muller did not testify that she engaged in any such conduct, and I have no basis for believing that Corbett should have accused her of anything other than what Muller appeared to admit, at least in part.

Second, the sequence and context of the alleged "warning," as related by Muller, made little sense. Corbett had been talking about the knowledge of the operating room nurses, and that had nothing to do with a "warning" that people were watching Muller, construed by the General Counsel to be a creation of an impression of surveillance. I find that there was no such warning and thus no creation of an impression of surveillance. The only warning that was discussed was the warning about Muller's distribution of the magazine article. Because the complaint also alleges that Muller was disciplined because she place Union literature in the nurses' lockers, and that is not what Corbett disciplined Muller about, I dismiss the allegation pertaining to the discipline. The General Counsel did not litigate that Respondent violated the Act when it gave Muller a warning for illegal solicitation.

The General Counsel also contends that the conversation constituted illegal interrogation. The Board instructed in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), that an interrogation is illegal when, under all the

circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. Evidence of the coercive nature of Corbett's interrogation is mixed. Corbett was Muller's immediate supervisor, and the meeting was held in Corbett's office. However, Muller was an open and active Union supporter. Corbett knew that Muller had previously gone to a Union meeting and knew that Muller actively support the Union. Indeed, Corbett gave Muller the warning about soliciting Union support from another nurse. (Muller's picture appeared on the first page of a Union flyer, but the record does not make clear whether the flyer was distributed before the conversation. Corbett did not testify that she saw that flyer.) The nature of the conversation does not appear to be threatening and the questions were not "designed to determine [Muller's] involvement in protected activities." *Hunter Douglas, Inc.*, 277 NLRB 1179, 1181 (1985), enfd. 804 F.2d 808 (3d Cir. 1986). Nor did the interrogation seek to find out about the support of the Union by other nurses. Rather, the conversation appeared to be harmless and ended with Corbett and Muller hugging, hardly the reaction of an employee who has been coerced. I conclude that it did not violate Section 8(a) (1) of the Act. *UARCO, Inc.*, 286 NLRB 55 (1987); *Churchill's Supermarkets, Inc.*, 285 NLRB 138 (1987), enfd. 857 F.2d 1474 (6th Cir. 1988); *Keystone Lamp Mfg. Corp.*, 284 NLRB 626 (1987); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).[9]

Respondent had a rule since 1986, which permitted the wearing of "[p]rofessional pins, Association service pins, or those authorized by Administration," but prohibited the wearing of other "pins, badges, insignia, buttons, signs, etc." This rule, like the bulletin board rule, was honored in its breach. Registered nurses wore Redskins buttons and buttons celebrating

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[9] The General Counsel's motion to strike a section of Respondent's brief as not being supported by record evidence is denied. In so ruling, I have considered that section, find it unpersuasive, and have not relied on it.

holidays, such as Valentine's Day, Christmas, Thanksgiving, Halloween, St. Patrick's Day, and Easter (for example, shamrocks, bunnies, skeletons which lit up). They wore buttons related to health care, such as those noting that they had given blood or "Nurses are the Heart of Health Care" or "Just Say No." Others were humorous, such as "Just Turned Forty," "I Need a Vacation," and "No Panic." Others were "cute," such as bears and Garfield the Cat. There were yet other buttons that had been distributed by the Hospital and related to services provided by it or health messages that it wished to impart. Finally, nurses wore buttons that had been distributed by their nursing associations. (The General Counsel contends that these were "Association" pins, which were permitted by the rule. However, as used in other of Respondent's rules, "Association" refers to the "Fairfax Hospital Association," whatever that entity is, but undoubtedly the same as the employer of the nurses in this proceeding.)

The Union decided to hold a "Button Day" and at Noon on April 17, 1989, Union supporters put on buttons which read:

NURSES:
LET'S WORK
TOGETHER
FPNA/DCNA

The pin showed clasped hands, undoubtedly preaching "solidarity." The same day Respondent promulgated the following new rule:

> All Association employees must wear an authorized name tag while on duty. Only professional pins, service pins may be worn in immediate patient care dress [sic].

Beginning that afternoon, nurses were told that they could not wear their FPNA/DCNA buttons. The Hospital maintained its position, despite the nurses' argument that the Union was a

professional association and that the official policy of the Hospital permitted the wearing of professional and association buttons. The nurses were advised that the policy was going to be strictly enforced and that any violation would be met with disciplinary action. In fact, the policy was enforced, at least with respect to the FPNA/DCNA buttons; and some nurses (Catherine Meister, Joan Whalen, Elaine Muller, and Jan Hylton) were given formal warnings for wearing the buttons, the first step in Respondent's positive disciplinary process. Other nurses — Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, and Tina Price — were told that they were to remove their buttons; and Mary Jane Mastorovich, the Hospital's assistant administrator, testified that a request to remove a button was a form of discipline.[10]

As to other buttons, the Hospital's actions were mixed. Some nurses were immediately advised that they were no longer entitled to wear buttons that they had been wearing, without objection and without disciplinary action, before April 17. But the prohibition on all buttons and nonconforming accessories, other than the FPNA/DCNA buttons, did not last very long. Nurses returned to wearing blood donor buttons, Redskins buttons, teddy bears, holiday buttons, humorous buttons, and the like. They continued to wear buttons provided by their own nursing associations. For example, the nurses in the orthopedic unit wore T-shirts and buttons which read: "I Love Every Bone In Your Body." The post-anaesthesia nurses wore buttons stating "Wake Up With a Recovery Room Nurse." In May 1990, when the hearing in this proceeding began, many nursing coordinators again started to enforce the rule, but not in all units.

The Board's normal rule is that employees have a protected right to wear union insignia while at work. *Ohio Masonic*

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[10] Claire Cocklin testified that she may have merely attended a meeting at which Respondent's new policy was announced. I do not find that this proves that she was disciplined.

Home, 205 NLRB 357 (1973), enfd. 511 F. 2d 527 (5th Cir. 1975). The leading decision of *Beth Israel Hospital v. NLRB* 437 U.S. 483 (1978), will be dealt with in more detail, below; but suffice it to state at this point that a rule that prohibits union solicitation in immediate patient-care areas in a health care facility is presumptively valid. Based on that decision, the Board has applied a similar presumption to the wearing of union insignia. *Mesa Vista Hospital*, 280 NLRB 298 (1986). The Board, however, will consider whether the health care facility promulgated the rule to promote the health and welfare of its patients or to thwart the employees' right to organize. *Ohio Masonic Home*, supra.

Here, there is no question that Respondent promulgated the rule in a direct and speedy reaction to the Union's "Button Day."[11] Before April 17, Respondent never appeared to care what buttons were being worn. The nurses wore whatever they wished, and Respondent prepared its own buttons which it asked the nurses to wear. The prohibition of April 17 was thus directed at no legitimate interest to protect patients from the buttons. Rather, the prohibition was part of Respondent's plan to stop all communication about the Union, even if the communication consisted of only a few words, as innocuous as those words that Respondent permitted to be worn on another button: "Nurses are the Heart of Health Care." The rule was also amended to exclude the wearing of "Association service pins," undoubtedly because Respondent realized that the nurses were arguing that the Union was an "Association" and the old rule might authorize the wearing of the Union's pin. The new rule, without the language about "Association" pins, was quickly applied to the Union's button, and it has always applied to that button, while

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[11] So speedy was its action that Respondent issued its new rule with the typographical error noted in the above quotation. However, to conceal that its action resulted from the Union's button, the rule was dated back to April 3, although Greene's memorandum announcing it was dated April 17.

the nurses have once again reverted to wearing their buttons which relate to a wide variety of other matters.[12]

Respondent's brief contends that its rule was amended because the earlier rule "contained a provision which prohibited, without limitation, the wearing of non-professional buttons or pins;" and that rule was "overly broad" and "in violation of Board law." As amended, the rule permitted employees to wear union pins "in all areas of the Hospital, except for immediate patient-care areas." As neat as this argument might appear, no one testified that this was the reason for the amendment; and I find that it constitutes merely a convenient pretext to excuse the illegality. In addition, even though a number of Respondent's supervisors testified that they enforced the new rule, I find that they did not and that nurses continued to wear buttons which did not offend their supervisors; but the nurses were afraid to wear their Union buttons. Respondent also contended that its policy was changed to prevent any disruption in patient-care areas. Because Respondent freely handed out its much more inflammatory anti-Union tracts in patient-care areas, which it knew would cause the nurses to react, I find that it was unconcerned about the creation of disruption. Respondent also alleges that it repudiated its prior unlawful conduct and thus relieved itself from liability. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978), requires, among other things, that any "repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights." Re-

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[12] The Union's motion to reopen the record to receive a videotape of a non-unit employee wearing various paraphernalia illustrating an obsessive love of the Washington Redskins is denied. The incident happened long after the hearing in this proceeding closed, and the granting of the motion would entail the reopening of the hearing to enable Respondent to explain its position and present additional evidence, all of which would add nothing, because the record amply demonstrates that the rule against the wearing of pins was disparately applied.

spondent gave no such assurances. Indeed, a review of the record reveals that it repudiated nothing. I reject that defense.

I conclude that the promulgation of the April 17 rule was illegal from its inception as it was motivated solely by the Union's pin and has, in any event, been disparately applied only to buttons issued by the Union. Respondent's requests of its nurses to remove their Union buttons and its discipline of them violated Section 8(a) (1) of the Act.

Another manner which the complaint alleges that Respondent tried to cut off communication among the employees was by enacting the following no-access rule:

> STATEMENT
>
> Off-duty employees are not allowed to return to, or to enter, the Hospital's physical property or premises to visit a patient, receive medical treatment or to conduct hospital-related business.
>
> GUIDELINES
>
> A. An off-duty employee is defined as an employee who has completed his/her normally scheduled shift.
>
> B. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.
>
> C. Special exceptions to this policy will require the *prior* approval of the appropriate assistant/associate administrator and the director of personnel.

The amended complaint alleges that this rule, adopted "[i]n or around mid-October 1988," was "overly broad." This allegation was omitted from the original complaint, which was based on the Union's unfair labor practice charge file on April 17, 1989; and Respondent now contends that the charge was filed outside the time allowed by the Act's Section 10(b) six-month limitations period. The complaint also alleges that the

rule was applied disparately and selectively on April 20 to coerce three off-duty nurses to leave a parking lot and that, the following day, they were given disciplinary warnings for violating the rule.

Board law holds that a no-access rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas, (2) is clearly disseminated to all employees, and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Furthermore, an employer may not deny off-duty employees entry to outside nonworking areas of its premises, unless the employer provides an adequate business justification for doing so. Ibid.; *Orange Memorial Hospital*, 285 NLRB 1099 (1987); *Presbyterian Medical Center*, 227 NLRB 904, 905 (1977), enfd. 586 F.2d 165 (10th Cir. 1978);

Respondent's method of disseminating its no-access rule was anything but clear. Employees were typically advised of the existence of a new policy by the issuance of a memorandum. For example, when Respondent issued its mailbox rule and revised personal appearance policy, it advised the employees in separate memoranda. Here, it did not. Usually, new policies were also placed in communications and policy books which were maintained in the various units and were announced by the nursing coordinators at staff meetings. Most nurses were unaware of the existence of the rule, but there were exceptions. Hylton found out about the rule in mid-October 1988 when she returned to work while off duty to distribute some literature about collective bargaining. She was told by then director of surgical nursing Karen Lemieux to go to the staffing office to read the policy. That office was not the location where the Hospital posted its policies at that time, but Hylton found it posted. The rule had not been in the unit communications and policy book, but was there the next day. Other nurses testified

that they first found out about the rule when they saw it posted (in November 1988), or when they saw it lying on a table and later saw it posted (Summer 1989) or when they heard about it from one of the nurses who had been disciplined in April 1989, and only one of the three disciplined nurses knew of the rule before then.

Respondent's brief contends that this testimony was insufficient to refute the testimony of Greene, who stated that employees are informed of the Hospital's personnel policies either through the internal mailboxes or from their supervisors or managers. Greene did not aver that the no-access rule was made known to the employees in either of these ways; and, although optimally, this is what Greene had hoped would happen with all the policies and rules, his generalized answer was insufficient to rebut successfully the testimony of the General Counsel's witnesses. Not one nursing coordinator testified that she told her nurses about the rule and no copy of any memorandum was placed in evidence. The testimony of Scott Southee, parking ID coordinator, that the Hospital's parking policy is "located in every administrative binder, which is located on every nursing unit, in every department" adds nothing to meet Respondent's burden to show the dissemination of the no-access rule to the nurses because Respondent failed to disseminate the rule through the channels it normally utilized. I thus find it unlikely that Southee did anything. Even if he did, the nurses were not expected to find new rules which Respondent was less than open in revealing. I find that the General Counsel produced enough to meet his burden that the rule was not clearly disseminated to all employees, as Board law required; and I reject Respondent's defense that the complaint's allegation was barred by Section 10(b). Except for Hylton, who discovered it only because she was being disciplined, no one was aware of the existence of the rule until November 1988, well within the six-months time for filing.

Furthermore, I find that Respondent had no legitimate reason for the adoption of its rule. Respondent offered two reasons for its promulgation. First, parking at the Hospital had reached the critical stage. There were not enough parking spaces available for all the employees on the afternoon shift if the day shift employees did not leave promptly. There are a number of problems with Respondent's position, not the least of which is that there was an utter failure of proof with respect to the other shifts, which traditionally employ far fewer staff. Thus, there was no showing that there was a parking problem if employees were to arrive early in the morning, when they were replacing the lesser number of employees on the night shift, or were to arrive after the day shift had ended, at which time the parking lot should have emptied. Indeed, Respondent's brief contends that it was "important to minimize any activity which would interfere with the availability of parking areas during the critical 2:30 p.m. to 3:30 p.m. time period." The rule was not limited to solving that problem, but was an illegal, blanket prohibition, not on parking, but on employees' access to Respondent's property for all the time that they were not working. *Presbyterian Medical Center*, 227 NLRB at 905. In addition, public buses stopped outside the Hospital's premises. If employees came by bus, they would not cause any problems in the parking areas; nor would any problems be caused by employees who parked on the public streets.

The second principal reason that Respondent relied on was that the parking lots were riddled with crime — assault, vandalism, theft, and suspicious persons. Respondent introduced evidence showing that there were numerous reports of illegal activity, but this activity occurred primarily in 1986 and 1987, and the number of incidence had tapered off in 1988, when (late in the year) Respondent adopted its new rule. This is not to disparage the Hospital's attempt to lessen the amount of crime, but the timing of the adoption of the no-access rule enforced for the first time only after the Union campaign began, is rather

persuasive evidence that the Union, not crime, was behind this rule. Besides, Respondent's proof of the conduct that it was allegedly attempting to prevent was less impressive that its brief portrays. For example, its allegations of "several violent assaults" was actually supported by one, another being a report of a wandering, suspicious woman (October 1987); and its allegations of four incidents of "extensive damage to vehicles" was supported by three where there was no damage and one of a broken cable, where it was difficult to determine whether the cable (under the car) was an act of vandalism. Almost all of these incidents occurred in 1987, a year before Respondent adopted its rule. Furthermore, the Hospital showed no correlation between the commission of crime and the overuse of the parking lots; and none of the illegal conduct was engaged in by returning employees or employees who stayed after their working hours. The conduct was engaged in by others, and whether the nurses returned to the Hospital or not would have had no bearing on the commission of any crime. I conclude that Respondent had no adequate business justification for adopting its rule and that it violated Section 8(a) (1) of the Act.

It follows that the imposition of the illegal rule on the three nurses on April 20 and their discipline the next day equally violate the Act. The facts are simple. April 20 was three days after Respondent stopped the nurses from wearing their FPNA/DCNA buttons. Nurses Eisenhauer, Muller, and Dorothy Vasilchek distributed leaflets captioned, "What's So Scary About A Button?" Muller was on a public sidewalk:[13] yet, two of Respondent's security guards asked her what she was doing and took her name. Eisenhauer and Vasilchek were leafletting in parking lots of the Hospital, and Mastorovich told them that they were not allowed to pass out leaflets and asked them whether they knew that. Eisenhauer said that she did not and

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[13] Respondent contends that Muller was standing with the other nurses. I credit Muller's testimony that she was not.

that, according to the no-solicitation rule, they were in the correct place. (That rule permitted solicitation in the parking lots by employees not on their working time.) Mastorovich asked her whether she had worked that day, and Eisenhauer replied that she had not. Mastorovich said that she was in violation of the no-access rule and again asked her to leave. both nurses refused, but they stayed only 10 more minutes because most of the nurses had already left. The following day, the three nurses were given written warnings, each of which stated that it constituted the second phase of the disciplinary process and that additional violations could lead to further disciplinary action. Neither Eisenhauer nor Vasilchek had ever been disciplined before.

Because the underlying rule violated the Act, any discipline that was based on the illegal rule also violated the Act. Furthermore, the discipline represented "double kill" in the sense that Respondent was punishing two of the nurses for second violations, despite the fact that they had not been disciplined before, and Muller was not even standing on the Hospital's property. If that were not offensive enough, Hospital officials treated these nurses differently from the way that they treated nurses who returned to the Hospital not to engage in union activity but to attend going away parties, Secretaries' Day luncheons, baby and bridal showers, Christmas parties, and to go to the library, the credit union, or the gift shop, or pick up their pay checks, or eat in the cafeteria or chat with or deliver tickets to other nurses, or to engage in sports.[14] Respondent contends that these nurses

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[14] It is true, as the Hospital contends, that there was proof that Hospital officials saw only some of these nurses returning, but I find that there was hardly any effort to search them out. I find especially persuasive the testimony of those nurses who returned to attend parties at which their supervisors were present. No effort was made to direct those nurses off the Respondent's property. Only Union activists were really being looked for, as evidenced by various reports of the security guards who searched the lots for automobiles containing Union paraphernalia.

were engaged in Hospital-related business, but I find that the nurses were engaged in activities to benefit themselves. In addition, the Hospital has permitted demonstrators to engage in anti-abortion protests on the Hospital's property, sometimes involving as many as 800-1000 persons. (Greene noted, however, that if an employee wished to engage in the protest, the Hospital's no-access rule required that permission be sought and given to return to the Hospital. The 800-1000 demonstrators were not employees and did not have to obtain the same permission.)

In sum, the Hospital was interested in nothing but union activity, and the no-access rule was yet another attempt to ensure that employees would not be able to exchange their views about the benefits of union representation. If security and overparking were not a concern when there were 800-1000 protesters on the grounds of the Hospital, surely they could not have been legitimate concerns when three nurses were attempting to hand out their leaflets. The Hospital felt that it had to give a public forum to the anti-abortion protesters. It did not have the same anxiety when it came to its dealing with the Union. That was an anathema; and, out of all the conduct that could be permitted, an attempt to organize by their employees could not be countenanced. That is blatant discrimination. I conclude that the discipline meted to Eisenhauer, Muller, and Vasilchek violated Section 8(a) (3) and (1) of the Act.

Respondent's obsession with the Union movement was not limited to making rules to discourage it. On May 5, from 5:30 a.m. to 7:00 p.m., nurses and other supporters of the Union, about 30 in all, some carrying balloons and none wearing signs, distributed packets of Union materials around the perimeter of the Hospital. Respondent had advance notice that there was going to be some Union activity, and at 2 o'clock that morning had picked up some Union literature which stated that nurses would be standing on county sidewalks and roads adjacent to

the entrances to the Hospitals and were going to be handing out authorization cards and other literature.

Prior to May 5 Greene had arranged to have photographers available to take still photographs and videotapes of the participants. Greene, Tim Klagholz, Respondent's director of its media services department, and the photographers drove around the premises of the Hospital for an hour, taking pictures, many with telephoto lenses, often on the direction of Greene, who pointed out the leafletteers he wanted pictures of. Klagholz and a photographer went out in another car later in the day to do the same picture-taking. In addition, Greene stationed a video tape recorder at the front entrance of the Tower Building, the Hospital's central structure, and demonstrators were taped from this location, too. As if that were not enough, the Hospital's security guards were also instructed to watch the leafletting all day; and nursing directors Kathleen Garrity and Lemieux also rode in other vehicles, Lemieux admitting that her function was to observe the union activity.

Although it is true that an employer's mere observation of union activities that are conducted in public does not violate Section 8(a) (1) of the Act, *Porta Systems Corp.*, 238 NLRB 192 (1978), enfd. 625 F.2d 399 (2d Cir. 1980), and that management need not hide, *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972), Board law does not authorize an employer to use patrolling cars, cameras, and videotapes to enhance its identification of those who are lawfully engaging in protected Section 7 conduct. The law permits the Hospital not to close its eyes, but it does not permit it to enhance its vision with telephoto lenses and to make repeated runs in cars around and around the premises. That constitutes activity out of the ordinary and has the tendency to unreasonably chill the exercise of employees' Section 7 rights. See *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986).

Respondent makes much of its alleged concerns, but those concerns were at best fabricated, because there was not one bit

of conduct engaged in by the demonstrators that involved any trespass, any violence, or any improper conduct. Nor was there any stoppage of work, or any threat which could reasonably have been interpreted as a stoppage of work, which would have permitted Respondent to rely on the fact that the Union gave it no notice under Section 8(g) of the Act, the purpose of which is "to give health care institutions an opportunity to prevent the disruption of patient care which can be foreseen by . . . picketing." *Service Employees Local 84 (Baptist Memorial Hospital)*, 266 NLRB 335, 336 (1983), enfd. 725 F.2d 684 (D.C. Cir. 1983). First, there was no picketing, and there was no strike. Indeed, at 2:00 a.m. Green had notice of the harmless activities that were going to be conducted later that morning. Even if Respondent had shown a reasonable idea that something dire was going to happen, and it is questionable that this would have necessarily permitted Respondent to take its pictures, *Glomac Plastics, Inc.*, 234 NLRB 1309, 1320-1321 (1978), remanded 592 F.2d 94 (2d Cir. 1979), enfd. 600 F.2d 3 (2d Cir. 1979), there is nothing to justify its repeated surveillance, with instructions to zero in on the faces of particular employees and others, even after it should have been evident that nothing more was going to occur that had already occurred.

Respondent's reliance on the fact that it also videotaped the anti-abortion rally is misplaced. First, the demonstrators were not protected under the Act. Second, even the videotape did not evidence the close-up photography that was engaged in to identify the persons involved in the union activities. Finally, the fact that pictures were also taken by the media and even by a friend of one of the participants who invited him to take the pictures, makes no difference. The essence of the unfair labor practice charge is that employers have no right to spy on the union and concerted activities of its employees. Such spying is coercive. The spying causes employees to fear that their employer has specifically identified them to take action, such as discharge or other discipline. Thus, it constitutes a threat to the

employees. Even if the Union adherents had made their identities public, here the Hospital's supervisors and agents made repeated trips around the premises, videotaping at length and taking numerous photographs. That would have the tendency to discourage the employees from acting as they were doing because they were being targeted in such a fashion, and violates the Act[15]. See, generally, *Cannon Electric Co.*, 151 NLRB 1465, 1468-1469 (1975).

The final rule attacked in the complaint relates to the employees' right to solicit support of the Union and distribute materials about it. The rule reads:

> STATEMENT
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> Solicitation for any purpose among employees has the effect of disturbing and disrupting the provision of health care services. Therefore, Fairfax Hospital Association prohibits solicitation for any purpose in designated patient care areas.
>
> GUIDELINES
>
> A. Persons Not Employees of the Association: Persons who are not employees of Fairfax Hospital Association may not solicit for any purpose on the premises of the Association.
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> B. Association Employees: Individuals who are employees of the Association may not solicit any employees, nor distribute literature, for any purpose during their working time. Working time

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[15] Although of no importance to this conclusion, I specifically discredit Respondent's witnesses, all of whom testified that they made no notes of who was engaged in the Union's demonstration and that they reported what they saw to no one. I find wholly improbable that their car rides were mere purposeless pleasure tours of the Hospital's grounds. In addition, to the extent that Respondent attacks the credibility of the General Counsel's witnesses, who testified to the surveillance, I credit them.

means the period of time scheduled for the performance of job duties, not including mealtimes, breaktimes or other periods when employees are properly not engaged in performing their work tasks.

C. Areas Within Association Facilities Where Solicitation is Specifically Prohibited:

— patient rooms;

— operating and recovery rooms;

— nurse's stations;

— rooms where patients receive treatment, such as treatment rooms of the emergency department, radiology, radiation oncology, and other therapy rooms;

— corridors adjacent to patient rooms, operating and recovery rooms, treatment rooms;

— sitting rooms on patient floors accessible to and used by patients;

— elevators or stairways used frequently to transport patients;

— locker areas adjacent to patient care areas.

D. Areas Where Solicitation Is Not Restricted: Areas where solicitation by employees not on their working time is permitted includes cafeterias, lobbies, gift shops, lounges, locker rooms, rest rooms and parking lots.

E. Areas Within Association Facilities Where Distribution is Specifically Prohibited: Distribution of literature in any work areas (to include areas listed in par C) is prohibited.

F. Disciplinary Action: Solicitation for any purpose during working time and/or in any of the areas where solicitation is prohibited will subject the employees to disciplinary action. Distribution of literature any time in working areas will subject the employee to disciplinary action.

The Act protects generally employees' right to self-organization. In order to organize effectively, employees must be permitted to talk with other employees to solicit their views and attempt to convince them of the benefits of mutual association. While employees are, during their working hours, expected to devote their full attention to their work — after all, that is what their employer is paying them for — during their nonworking time, they are not being paid and generally have the right to do what they want. Thus, the Board usually presumed that no employer could adopt a rule prohibiting solicitation on nonworking time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-804, and fn. 10 (1945). However, the Board found this presumption unworkable in a hospital setting because it gave too little weight to the need to avoid disruption of patient care and disturbance of patients. Thus, the Board found that it would not regard as presumptively invalid proscriptions against solicitation in immediate patient-care areas, *St. John's Hospital,*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977), a position accepted by the United States Supreme Court in *Beth Israel Hospital v. NLRB*,437 U.S. 483 (1978). There, the Supreme Court upheld the Board's conclusion that the hospital had not justified its prohibition of union solicitation in the cafeteria, gift shop, and lobbies on the first floor of the hospital.

Respondent's no-solicitation rule is carefully crafted to bring it within the scope of *Beth Israel*, but the General Counsel contends that the rule was invalidly applied because Respondent permitted employees to solicit other employees and distribute

material to them in violation of the rule, while it disparately enforced the rule when pro-Union employees attempted to solicit support for the Union or attempted to distribute material about it. Furthermore, the General Counsel contends that Respondent itself solicited employees with anti-Union material in areas prohibited to Union adherents.

The rule did not restrict solicitation in Respondent's cafeteria, but the adjoining meeting room, the cafetorium, was not one of the areas where the rule permitted solicitation. However, book sales from the Hospital's library and outside booksellers, a Fall craft fair, and shoe sales have been held there. Blood drives have been held in the cafeteria, and books and tickets have been sold there, as well as the advertising of picnics and hospital trips. The following items, among others, have been sold, sometimes in open view of patients, in various areas where the Hospital has prohibited solicitation: Tupperware, Avon products, Girl Scout cookies, candy bars, citrus fruit, Easter baskets, flowers, plants, tote bags, T-shirts, Christmas cards, wrapping papers, and ribbons. I infer from the widespread and open solicitation and distribution of these items that Respondent had full knowledge of these solicitations. *St. Vincent's Hospital*, supra, 265 NLRB at 38 fn. 3.

The record is barren of any evidence that anyone had ever been disciplined for advertising or selling any of these products. Yet, Union literature was subjected to different rules. Greene testified that distribution of Union literature at the nurses station was a violation of the rule. Nurses were warned that they were prohibited from distributing Union literature in the nurses lounge, despite the fact that a notice for a shower, after having been removed from a bulletin board, was allowed to remain on the table in the lounge, and the additional fact that the nurses lounge was supposedly exempt from the rule. (Indeed, nursing coordinator Jonathan Hurwitz told Price that she was not allowed to bring Union literature into the Hospital at any time.)

So, Union material that was left there, and even in the cafeteria, was confiscated.

While the Union adherents were restricted by the no-solicitation, no distribution rule from freely handling out their propaganda, the Hospital felt itself bound by no such restrictions, even in areas where the Union was not allowed to campaign. Respondent published numerous anti-Union posters (11" by 17") which were placed on the bulletin boards and smaller versions of which were printed as hand-outs. Some of these were headed "Why Fairfax Nurses Oppose The Union," and Respondent advised all the nursing coordinators to make sure that they were distributed to all the nurses. Often these were distributed while the nurses were working and in patient-care areas, most often at or near the nurses stations, and sometimes in areas in close proximity to patient rooms. They were also left in the nurses' report rooms.

On December 4, 1989, nursing coordinator director Marianne Heberer suspended for one day of "decision-making leave" nurses Vasilchek and Vicki Herman for violating the rule. That meant that they were to go home and think things over to see whether they understood what they had done wrong and to return to work only if they intended not to err again. This resulted from the following credited facts, which primarily are those related by nurse Tracy Maslyn, who I found had no reason to mistake what happened, whereas Vasilchek and Herman slanted their narration to protect themselves from the Hospital's discipline: Earlier, during the night shift of November 13-14, Maslyn was reassigned to the unit on which Vasilcheck and Herman regularly worked. Vasilcheck and Herman went into the cubbyhole, a small open area off the nurses lounge and an area where nurses would regularly take their break on the night shift, despite the fact that it was also used by the nurses for charting and documentation work, paging people, and making phone calls.

Maslyn was there charting. Vasilcheck and Herman, recognizing that Maslyn was pregnant, started a conversation about her future plans, whether she was going to return to work after she had her baby, and the quality of the Hospital's health and child care benefits. They mentioned that the Union was very active in pushing the Hospital to build a day care center. They asked whether she knew about the Union, whether there were active Union supporters on her floor, and whether she would be interest in attending a Union meeting, which would be called a Tupperware party (presumably so that management would be unaware of what was going on.) They asked whether she would be interested in reading about the Union; and when Maslyn said that she would, Herman left to get a Union authorization card and a Union flyer. Herman returned and gave her the documents. Vasilchek also gave her a Union newsletter. The conversation ended, and all returned to work. However, Vasilchek noticed that Maslyn had left the Union literature where she had been sitting. Vasilchek brought the literature to her - she was standing near the nurses station — and told her to take the information and read it later. Heberer eventually found out about the conversation and the distribution of the Union material, and the discipline followed.

The General Counsel is incorrect in claiming that Respondent disparately enforced its no-solicitation rule because it solicited its anti-Union material in violation of its own rule. In *Summerville Tiles, Inc.*,, supra, 300 NLRB No. 9, the Board stated that Section 8(c) permits an employer and its agents to express their views on unionization as long as the opinions do not contain proscribed threats or promises, citing *Gissel Packing Co.*,, 395 U.S. 575, 618-619 (1969). Absent evidence that a union does not have sufficient means to communicate with the employees, an employer does not violate the Act by enforcing a valid no-solicitation rule while engaging in antinion solicitation of its own. *NLRB v. Steelworkers (Nutone, Inc,) 357 U.S. 357,364 (1958).* As the Board stated in *St. Francis Hospital,*

263 NLRB 834, 835 (1982), enfd. 729 F.2d 844 (D.C. Cir. 1984): "[N]othing in law nor logic limits this right of an employer to discussions with employees only in nonwork areas on the employees' breaktimes." To the contrary, an employer may lawfully campaign during employees' nonbreaktime and in working areas even though employees may not do so. In such a case , an employer has not unlawfully enforced its no-solicitation, no-distribution rule in a disparate manner or unlawfully violated its rule.

That does not mean, however, that Respondent is free to limit its employees' rights without limitation. The Board's general rule is to permit employees to organize during their own time. Only in hospitals is there a limitation on the places where the employees may exercise their rights, and that is because the Board presumes that organizing in patient-care areas will be disruptive to the medical care that is the hospital's primary mission to deliver. Here, Respondent, by engaging in the very activities prohibited to its employees, has created evidence that perhaps its limitation on its employees is not warranted, that employees' solicitation in the same areas would not disrupt the delivery or medical care. In other words, although Respondent has the right to solicit and distribute as it wishes, it may not limit its nonworking employees from engaging in Section 7 activities when they are not working and when they are in areas where there would be no disruptive effect.

Here, Vasilchek and Herman testified that they were on break, although Maslyn disputed the fact that they were eating their sandwiches, as they contended, and I have credited her. But, even assuming that they were on break, Maslyn was not: and the rule prohibits solicitation which "has the effect of disturbing and disrupting the provision of health care services." She was charting, and Vasilchek and Herman were disturbing her work and causing her to delay finishing her work within her normal shift. Respondent's rule was intended to prohibit solic-

itations during working time, and the rule is drawn so broadly that it prohibits both off-duty and on-duty nurses from soliciting nurses who are working.[16]

The General Counsel contends that Respondent did the very same thing as Vasilchek and Herman did. Indeed, several months later, on March 1, 1990, Heberer gave Vasilchek one of the Hospital's anti-Union flyers in the same cubbyhole, while Vasilchek was charting. And there is sufficient evidence that many of Respondent's anti-Union tracts were handed out at the nurses station and in other areas which Respondent protests were patient-care areas.[17] Furthermore, Greene testified that Respondent knew that its literature would generate discussion, as it in fact did.

However, there is nothing in the record to prove that Respondent permitted its employees to engage in anti-Union discussions or solicitations in patient-care areas or when they were on duty. To the contrary, on one occasion, a nursing coordinator asked some nurses to leave the nurses station and go back into the cubbyhole so that the patients would not overhear them. Furthermore, as noted above, Respondent had the right to solicit employees and to distribute literature, whereas employees has no such right. Finally, the General Counsel complains that the punishment must have been illegally motivated because Respondent disciplined the two nurses for two violations, solicitation and distribution. However, under Sec-

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[16] The rule states that "employees . . . may not solicit any employees, nor distribute literature, for any purpose during their working time." It is unclear whether the word "their" refers to the employees who are soliciting or being solicited. In light of the general purpose of the rule, it may reasonable be argued that it refers to both.

[17] "Monday Rounds," which is published by Respondent and has been left in stacks at the front desk of the nurses stations, is not evidence of disparate application of respondent's rule. Despite the fact that the publication contains some advertisements, it is primarily a newsletter of interest to the Hospital community and not a commercial document.

tion F of the rule, violation of the no-solicitation and no-distribution rules are treated as separate violations; and I find no evidence that Respondent incorrectly or disparately charged the nurses with two violations, rather that one, for their conduct. They solicited Maslyn to become interested in the Union and distrusted material to her, both of which are violations. Accordingly, I will recommend that this allegation be dismissed.

However, having prohibited dissemination of and confiscated material in places where its rule permitted employees to engage in such activities, and having prohibited employees from engaging in those activities in locations which, by its own conduct, Respondent could not have considered patient care areas, Respondent violated Section 8(a) (1) of the Act. Respondents rule unduly restricted the nurses' ability in their free time to solicit and distribute for the Union in areas where Respondent permit solicitations in violation of the rule, and Respondent maintained and enforced the rule only as it pertained to Union solicitations and distributions. I conclude that Respondent's maintenance and disparate enforcement of the rules violates Section 8(a)(1) of the Act.

The final allegation of the complaint relates to the discharge of Richardson on March 8, 1990. Richardson was a nurse in the hemodialysis unit at the Hospital. She had 27 years of experience as a nurse, 15 at the Hospital, and was certified in her specialty. On March 5, 1990, she saw posted in her unit one of Respondent's series of "Why Fairfax Nurses Oppose the Union," which told of a particularly ugly event of a patient being told on his way to surgery that he would not receive good treatment because his wife had refused to support the Union. Two days later, during a break, Richardson engaged in a heated discussion with her nursing coordinator, Terri Booth, about the substance of that poster, which Booth had given her a copy in its flyer version. Richardson doubted that the facts could be accurate, while Booth believed the flyer, and Richardson asked

in bewilderment how Booth could believe that a nurse could engage in that sort of conduct. She said that she had never seen any conduct like that in all her years of nursing. Despite her arguments, Booth maintained that the Hospital would never falsely publish any such information.

Richardson tried other means to persuade Booth that the facts were illogical and could not be true. She thought that Booth ought to have known that the incident could not have happened and was offended that, if Booth thought carefully about the allegation, she would have known that it was false and would never have circulated the handout, that the poster was big enough that she could read it on the bulletin board. Richardson asked why, in addition to posting the poster on the normal bulletin board, it also had to be put in the nurses' bathroom. Booth replied that the Hospital owned the entire hospital and could post its propaganda wherever it wanted. Richardson contended that the pro-Union nurses should also be able to post their notices. (The record amply demonstrates that the pro-Union posters had been taken down in these locations.)

The break was ending and, as Richardson was getting up to leave, Booth commented that the Hospital's posting was unpleasant for everyone and the unpleasantness was probably going to get worse. Richardson recalled that Booth said: "[Y]ou better get used to it because there will be a lot more of these things coming." Richardson replied that Booth could expect "retaliation."

Richardson's use of the word "retaliation"caused her discharge, at least according to Respondent, whose witnesses uniformly testified that they understood that to mean that Richardson threatened Booth with physical harm. Booth said that she was so alarmed that she became nauseous and poured herself three cups of coffee before she realized what she was doing. She could barely control herself. She reported the incident to her supervisors; and, as each inquired into the inci-

dent, each became alarmed at the emotional intensity of the situation, and each reached the conclusion that the threat of physical harm to a supervisor would not be tolerated.

I watched all the witnesses carefully as they testified. I have reviewed the Official Transcript numerous times. I do not believe Respondent's witnesses. I find that they were not sincere; I find that they were not candid. I find, instead, that they seized upon the word "retaliation"as a means of ridding themselves of one of the Union's outspoken supporters to show to all nurses the dangers of questioning management's anti-Union positions.

There is absolutely nothing in Richardson's background, as a person, as a nurse, and as an employee, to indicate that violence is part of her makeup. Rather, she is a consummate professional, dedicated to the care of her patients. She is an advocate of the rights of patients. She is an educator. She is devoted to nursing. She is a woman of substance. She is principled. She is highly thought of by her peers. It is true that she is outspoken, and she may be more animated and more intense, and her voice may rise above normal conversational levels. But to make her appear as a common street bully is wholly unwarranted, and I find that Respondent's accusation was made with no sincerity.

Second, although the word "retaliation" might be stretched to subsume some understanding of violence, that stretching is undoubtedly incorrect. "Retaliation" correctly means an action which is returned in kind. Webster's *Third New International Dictionary,*1981, defines "retaliation" as "an act of retaliating: REQUITAL; *esp* : return of evil for evil." "Retaliate" is defined as "*vt* **1** : to return the like for : repay or requite like for like: make requital; *esp*: to return evil for evil." The *Dictionary* further notes:

> syn RECIPROCATE, RETALIATE, REQUITE, and RETURN can mean to give back usu. in kind or

> quantity. RECIPROCATE can imply a mutual, equivalent or roughly equivalent, exchange or a paying back of what one had received . . . RETALIATE usu. implies a paying back in exact kind, often vengefully . . . REQUITE can imply simply a paying back usu. reciprocally, but also often implies a paying back according to what one considers the merits of the case
> . . . .

The latter part of the Booth-Richardson conversation was devoted to the Hospital's right to post and distribute its anti-Union tracts, while the Union was left helpless in its efforts to spread its message in the Hospital. The tenor of the discussion was devoted to what Richardson decried as an inflammatory, outrageous attack on the Union. All that was talked about was literature, and Richardson's use of "retaliation" was obviously intended to reflect her decision, on behalf of the Union and the nurses, to attack, *in words*, the flyer that she complained was not only unfair but also untrue. There were two nurses who heard either all or parts of this conversation. Neither characterized Richardson's comment as being one that could reasonably be understood in the entirety of the circumstances as one which threatened physical harm.

Even if there were some threats made by Richardson, Respondent's rules nonetheless presented it with a problem. Respondent had a system of progressive discipline, and a threat did not fit easily into its guidelines to permit it to discharge an employee. This is not to say that a serious threat (with a knife, for example) could under no circumstances be the basis for the immediate firing of an employee, but Respondent justified its discharge of Richardson by noting that its rules specifically permitted the discharge of one who assaulted another. Because Richardson threatened Booth with physical harm, her words were in the nature of an assault, according to Miller, who approved Richardson's discharge. Interestingly, Respondent's

brief hedges on this, noting that there was "future physical *or psychological* harassment of Ms. Booth" and that Richardson intended to inflict on Booth the same type of injury that Richardson said that she had suffered: "personal upset, offense and anger." (Emphasis supplied.) There is no question that there was not physical contact made at any time by Richardson, no less an assault with an intent to harm anyone. In addition, although Respondent's disciplinary rules seem to require it to talk with its employee and obtain that person's views of the incident, no one talked to Richardson. She was a dangerous person, in effect a common felon, in the Hospital's eyes. Conveniently, all connected with the Hospital disregarded her outstanding evaluations, her expertise, her humanity, in a desperate rush to prove that the defense of the Union might well subject an employee to harm much greater that having to read antiunion material.

What lingers is whether Booth was as hysterical as most of Respondent's witnesses said that she was. If she was, it was not because of any threat. I am convinced that Booth was upset; but she was mad at the substance of the entire conversation. She was being ridiculed as Respondent's stooge, one who would believe without thinking that everything that the Hospital said was correct. Her intelligence and her allegiances were being questioned. However, Respondent's focus was on Richardson's attack on its labor relations policies. Respondent then used the word "retaliation" to concoct a legitimate reason for discharging her, whereas all that was really involved was a deeply felt disagreement arising from the Hospital's opposition to the Union's attempt to organize the nurses.

Finally, Richardson was complaining, in the presence of another employee, Linda Ensign, about the inability of the Union to post its literature, while Respondent was dramatizing its claims against the Union by means of untruthful literature posted on bulletin boards and distributed to all nurses in handouts. Her complaint constituted concerted and protected activ-

ity, and she could not be disciplined unless her conduct was so egregious as to render her conduct unprotected. I find that her conduct was not egregious within the meaning of Board law. *Leasco, Inc.* 289 NLRB 549 fn. 1 (1988); *Consumers Power Co.* 282 NLRB 130, 132 (1986). Because Respondent seized upon the word "retaliation" merely as a pretext to justify its actions, there is no issue under *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1989), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Respondent had no reason to discharge Richardson other than illegal ones. I conclude that Respondent's discharge of Richardson violated Section 8(a) (3) and (1) of the Act.[18]

The unfair labor practices found herein, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2 (6) and (7) of the Act.

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[18] Respondent contends that there is no evidence of union animus, because all of its writings were protected by the free speech exception contained in Section 8(c) of the Act, relying on *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990). The Board did not adopt that holding on remand. 302 NLRB No. 71 (April 5, 1991), dismissed 947 F.2d 588 (2d Cir. 1991). Instead, it continues to hold that conduct that may not be found violative of the Act may still be used to show animus. *Gencorp*, 294 NLRB 717 fn. 1 (1989); *General Battery Corp.*, 241 NLRB 1166, 1169 (1979), enfd, mem. 620 F.2d 294 (4th Cir. 1980). Here, a finding of a lack of animus would have to ignore Respondent's series of posters and leaflets entitled: "Why Fairfax Nurses Oppose The Union." It would also have to ignore that the reason for the argument between Richardson and Booth was one of the articles of that series and, in essence, what lengths the Hospital would travel in its opposition to the Union. Even if that particular article were ignored, Respondent committed numerous unfair labor practices which may be considered evidence of its state of mind, including its illegal attempts to discourage nurses from communicating about the Union in the Hospital.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent to offer immediate and full reinstatement to Kathryn ("Kitty") Richardson to her former position or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of wages and other benefits she may have suffered by reason of Respondent's discrimination against her, in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also order Respondent to rescind its rules prohibiting distribution of literature in employee mailboxes, denying access of off-duty employees to its property, and prohibiting employees from wearing insignia on their uniforms in support of the Union or any other labor organization. I shall also order Respondent to rescind its disciplinary warnings, including fact-finding memos or oral reminders, issued to any of its employees, including Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, Jan Hylton, Catherine Meister, Elaine Miller, Tina Price, and Joan Whalen, in connection with their wearing buttons in support of the Union and issued to employees Dorothy Vasilchek, Elain Muller, and Kathleen Eisenhauer in connection with their leafletting activities on behalf of the Union; and remove from their files and the file of Richardson any reference to their unlawful warning and discharge, respectively, and notify them in writing that this has been done and that the warnings and discharge, respectively, will not be used against them in any way.

Upon the foregoing findings of fact and conclusions of law and the entire record[19] in this proceeding, including my obser-

[19] The parties' joint motion to amend the Official Transcript is hereby granted and the Transcript is amended accordingly.

vation of the demeanor of the witnesses as they testified, and my consideration of the briefs filed by the General Counsel, Respondent, and the Union, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:[20]

ORDER

Respondent Fairfax Hospital, an unincorporated division of Inova Health System and Fairfax Health System, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Selectively and disparately maintaining and enforcing its rule concerning employee bulletin boards by removing union-related solicitations and distributions while permitting nonunion-related solicitations and distributions to remain, in order to discourage its employees from supporting the District of Columbia Nurses Association, American Nurses Association, American Nurses Association ("Union"), or any other labor organization.

(b) Confiscating Union literature from employee mailboxes.

(c) Promulgating and selectively and disparately enforcing any rule concerning employee mailboxes by prohibiting distribution of union-related materials while permitting distribution of nonunion-related materials, in order to discourage its employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

(d) Promulgating and selectively and disparately enforcing any rule regarding wearing of Union pins in patient care

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[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

areas by telling its employees to remove Union buttons, while permitting other of its employees to wear nonunion-related buttons, in order to discourage its employees from supporting the Union or any other labor organization.

(e) Promulgating and selecting and disparately enforcing any rule prohibiting its off-duty employees from returning to its property by telling some of its employees to leave the grounds and disciplining them for violating the rule, while permitting others of its employees to return to its property, in order to discourage its employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

(f) Engaging in surveillance of its employees' union activities.

(g) Selectively and disparately enforcing any rule concerning solicitation and distribution by prohibiting union-related solicitations and distributions, in order to discourage its employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

(h) Discharging its employees because they join, support, or assist the Union or any other labor organization or because they engage in other protected concerted activities.

(i) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind its rule prohibiting distribution of literature in employee mailboxes.

(b) Rescind its rule concerning access of its off-duty employees to its property.

(c) Rescind its disciplinary warnings, including fact-finding memos or oral reminders, issued to employees Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, Jan Hylton, Catherine Meister, Elaine Muller, Tina Price, and Joan Whalen, because they wore buttons in support of the Union.

(d) Rescind its April 17, 1989, revised personal appearance policy to the extent that is prohibits its employees from wearing insignia on their uniforms in support of the Union or any other labor organization.

(e) Rescind the disciplinary warnings issued to employees Dorothy Vasilchek, Elaine Muller, and Kathleen Eisenhauer because they leafletted on behalf of the Union.

(f) Offer Kathryn ("Kitty") Richardson immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of its discrimination against her in the manner set forth in the section of this Decision captioned "The Remedy."

(g) Remove from their files any reference to the unlawful warnings issued to Elaine Muller, Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, Jan Hylton, Catherine Meister, Tina Price, Joan Whalen, Dorothy Wasilchek, and Kathleen Eisenhauer, and the discharge of Kathryn ("Kitty") Richardson and notify them in writing that this has been done and that the warnings and discharge, respectively, will not be used against them in any way.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards personnel records, and all other records necessary to analyze the amount of backpay under the terms of this Order.

(i) Post at its facility in Fairfax, Virginia, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posed. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director for Region 5 in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 4, 1992

/s/Benjamin Schlesinger
Administrative Law Judge

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[21] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

United States Court of Appeals
For the Fourth Circuit

FAIRFAX HOSPITAL

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent,

DISTRICT OF COLUMBIA NURSES ASSOCIATION

Respondent-Intervenor.

No. 93-1272, 5-CA-20387, 5-CA-20468,
5-CA-21042, 5-CA-21048

NATIONAL LABOR RELATIONS BOARD

Petitioner,

v.

FAIRFAX HOSPITAL

Respondent.

No. 93-1467, 5-CA-20387, 5-CA-20468,
5-CA-21042, 5-CA-21048

FILED
January 4, 1994

On Petition for Rehearing
with Suggestion for Rehearing In Banc

Petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/Bert M. Montague
Clerk

United States Court of Appeals
For The Fourth Circuit

FAIRFAX HOSPITAL

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

DISTRICT OF COLUMBIA NURSES ASSOCIATION

Respondent-Intervenor.

Case No. 93-1272

NATIONAL LABOR RELATIONS BOARD

Petitioner,

v.

FAIRFAX HOSPITAL

Respondent.

Case No. 93-1467

MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR PUBLICATION OF THE COURT'S OPINION

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

On December 8, 1993, a panel of this Court (Associate Justice Powell (Retired), United States Supreme Court, Circuit Judges Wilkinson and Hamilton) issued a 24-page unanimous unpublished per curiam opinion enforcing the Board's order in full in the instant case. The National Labor Relations Board, by

its Deputy Associate General Counsel, pursuant to IOP 36.4, respectfully moves the Court to publish its opinion, and shows:

1. IOP 36.4 of this Court provides, in pertinent part, that "[o]pinions delivered by the Court *will* be published only if the opinion satisfies one or more standards for publication . . . ." (emphasis supplied) The listed standards include opinions that "establish . . . clarif[y], or explain[] a rule of law within this Circuit" or involve an issue of continuing public interest."

2. A key issue in this case concerned the Hospital's prohibition, allegedly in the interest of patient care, of prounion distributions and solicitations in patient care areas in which it distributed antiunion literature. That issue is of continuing public interest.

3. The Court's opinion (slip op 17-19) addressed and adopted the Board's rationale that the Hospital's own antiunion solicitations in patient care areas indicated that the Hospital never needed to apply its rule prohibiting solicitation and distribution in those areas. Recognizing that under *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978), a case on which Justice Powell sat, the Hospital had the burden of proving that the prohibition on solicitation was necessary to lessen disruption to patients, the Court found here that the Hospital had not met its burden and "knew that no disruption of patient care would occur from solicitation in banned areas." slip op 19. The Court's opinion thus clarifies and explains the reach of *Beth Israel*, which dealt only with prounion solicitations and disruptions in a hospital cafeteria, and also clarifies and explains *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932 (4th Cir. 1990), which enforced a Board order requiring the Hospital to allow prounion distributions and solicitations only at hospital entrance doors in the early morning. The instant opinion explains that prohibitions against solicitation and distribution of prounion literature, even in areas of actual patient care, must be justified by the Hospital as "necessary to lessen disruption to

patients" and clarifies the weight given by the Court to a hospital's own antiunion solicitations in prohibited areas. slip op 19. Accordingly, publication of the opinion would provide considerable guidance in these areas to future litigants, and be of interest to the labor bar in general.

4. For these reasons, general, rather than restricted, availability of the Court's opinion is warranted under IOP 36.4

5. District of Columbia Nurses Association, the Intervenor in support of the Board's position in this case, joins in this motion.

WHEREFORE, the National Labor Relations Board requests that the Court publish its opinion in this case.

/s/Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 14th day of December, 1993.

29 USCS § 158

§ 158. Unfair Labor Practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];

* * * *

(c) Expression of views without threat of reprisal or force or promise of benefit. The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit

* * * *

(2)

Supreme Court, U.S.
FILED
MAY 25 1994
OFFICE OF THE CLERK

No. 93-1519

In the Supreme Court of the United States

OCTOBER TERM, 1993

FAIRFAX HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the finding of the National Labor Relations Board (Board) that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by selectively and disparately enforcing a no solicitation/no distribution rule is consistent with Section 8(c) of the Act, 29 U.S.C. 158(c), and *NLRB* v. *United Steelworkers (NuTone, Inc.)*, 357 U.S. 357 (1958).

2. Whether the Board's finding of a violation of Section 8(a)(1) based on petitioner's photographing and surveillance of union activities conducted on public property adjacent to the hospital is consistent with *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992).

3. Whether the Board's finding of a violation of Section 8(a)(1) based on petitioner's selective and disparate enforcement of an off-duty employee access rule is consistent with *Lechmere, Inc.* v. *NLRB*, *supra*.

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In the Supreme Court of the United States

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No. 93-1519

FAIRFAX HOSPITAL, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is unpublished, but the judgment is noted at 14 F.2d 594 (Table).[1] The decision and order of the National Labor Relations Board (Pet. App. A27-A36) and the decision of the administrative law judge (Pet. App. A37-A86) are reported at 310 N.L.R.B. 299.

[1] On December 22, 1993, the court denied the Board's motion (Pet. App. A89-A91) for publication of the court's opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1993. A petition for rehearing was denied on January 4, 1994. Pet. App. A87-A88. The petition for a writ of certiorari was filed on March 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a large hospital in Fairfax, Virginia (the Hospital). In the summer of 1988, the District of Columbia Nurses Association (the Union) began an effort to organize petitioner's registered nurses (RNs). Pet. App. A37-A39, A41.

In September, petitioner learned of the organizing effort. Pet. App. A3, A41. Shortly thereafter, petitioner promulgated an "Off-Duty Employee Access Rule" prohibiting off-duty employees from entering or returning to Hospital property except to visit a patient, receive medical treatment, or conduct hospital-related business, which was defined as "the pursuit of the employee's normal duties or duties as specifically directed by management." *Id.* at A6 & n.2, A59. Petitioner did not follow its normal method of dissemination of the new rule and most RNs were unaware of its existence.[2] Petitioner selectively

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[2] Petitioner's usual policy with respect to the dissemination of newly promulgated rules was to distribute to employees a memorandum advising them of the new rule and to place copies of the new rule in policy books maintained by nursing coordinators in the various nursing units throughout the Hospital. In this instance, however, no memorandum was circulated and no copies of the rule were placed in policy books. Rather, a copy of the rule was initially posted only in the

enforced the new no-access rule. Off-duty RNs, without incident, returned to the Hospital to attend baby showers, parties, luncheons, and social and athletic events; to conduct credit union business; to pick up merchandise they had purchased from fellow workers; and to use the hospital library. RNs who returned to distribute union literature, however, were asked to leave, disciplined, or both. *Id.* at A64-A65. Three RNs were disciplined for leafleting for the Union on public sidewalks outside the Hospital during their non-working time. They were each given a written disciplinary warning that stated that the warning constituted the second phase of the disciplinary process and any further violations could lead to further disciplinary action. *Id.* at A63-A64.

Since November 1986, petitioner had in effect a policy prohibiting employees from soliciting or distributing literature for any purpose during working time on hospital premises and in designated patient care areas. Solicitation was permitted in cafeterias, lobbies, gift shops, lounges, locker rooms, rest rooms, and parking lots. Violations of the policy would result in discipline. Pet. App. A8, A9, A68-A71. The rule, however, was not strictly enforced. In fact, no one had ever been warned or disciplined for advertising or selling T-shirts, gift wrap, candy, Tupperware, cosmetics, cookies, fruit, plants, flowers, baskets, or tote bags throughout the Hospital in open view of patients in prohibited areas. *Id.* at A9 & n.6, A71. Petitioner, however, vigorously suppressed solicita-

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Hospital's staffing office, where rules were not usually posted. As of the summer of 1989, most RNs remained unaware of the new rule. Pet. App. A60-A61.

tion for the Union. Although the rule permitted solicitation in nurses' lounges, nurses were warned not to distribute pro-union literature in the lounges and were disciplined for doing so. While other literature was allowed to remain in the lounges, any union literature was quickly confiscated by petitioner. *Id.* at A71-A72.

On May 5, 1989, about 30 RNs and other Union supporters distributed packets of union materials on the public sidewalks and roads around the perimeter of the Hospital. Petitioner hired photographers to photograph and videotape the participants, and hospital supervisors rode in cars with the photographers to tell them which people to photograph and to observe the leafleting. Pet. App. A65-A66.

The Union filed charges with the National Labor Relations Board (the Board), alleging, *inter alia*, that, by the foregoing conduct, petitioner had violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1).[3] Based on those charges, the Board's General Counsel issued a complaint. Pet. App. A38 n.2.

2. After a hearing, the Board's administrative law judge (ALJ) concluded, *inter alia*, that petitioner had violated Section 8(a)(1) of the Act in several respects. Pet. App. A37-A86.

The ALJ found that petitioner's rule denying access to off-duty employees violated the principles

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[3] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. 157]." Section 7 rights include the right "to self-organization" and "to form, join, or assist labor organizations."

announced in *Tri-County Medical Center, Inc.*, 222 N.L.R.B. 1089 (1976), because the rule was not clearly disseminated to all employees, Pet. App. A60-A61; was not shown, as petitioner had claimed, to be necessary to alleviate alleged parking shortages and crime in the Hospital's parking lots, *id.* at A62-A63; and was applied only to those off-duty employees who came to the Hospital to engage in union activity, *id.* at A64-A65. In particular, the ALJ found that petitioner routinely allowed off-duty employees to return to the Hospital for a variety of reasons unrelated to work, but disciplined only those off-duty employees returning to the Hospital to engage in union activities. *Ibid.*

The ALJ further found that petitioner's no solicitation/no distribution rule was disparately and selectively enforced against union advocates in violation of the Act. Solicitations and distributions of all sorts occurred throughout the Hospital and "sometimes in open view of patients," and no one "had ever been disciplined for advertising or selling any of these products." Pet. App. A71. Citing *NLRB* v. *United Steelworkers (NuTone, Inc.)*, 357 U.S. 357, 364 (1958), the ALJ recognized that, "absent evidence that a union does not have sufficient means to communicate with the employees, an employer does not violate the Act by enforcing a valid no-solicitation rule while engaging in antiunion solicitation of its own." Pet. App. A73. The ALJ also recognized that, because of the special requirements of a hospital, organizational activity by off-duty employees may be limited in patient-care areas. The ALJ concluded, however, that because petitioner engaged in antiunion activities in patient-care areas, its conduct indicated that solic-

itation by employees in the same areas would not disrupt the delivery of medical care. The ALJ therefore found that petitioner's application of its no-solicitation rule violated the Act. *Id.* at A73-A74.

Finally, the ALJ found that petitioner's acts of photographic and personal surveillance violated the Act. The ALJ noted that under *Hoschton Garment Co.*, 279 N.L.R.B. 565, 567 (1986), an employer may not use "patrolling cars, cameras, and videotapes to enhance its identification of those who are lawfully engaging in protected Section 7 conduct." Referring to the evidence that established that the demonstrators here did not engage in trespasses, work stoppages, strikes, violence, or improper conduct, the ALJ concluded that petitioner's alleged concerns about the demonstrators "were at best fabricated," and that there was "nothing to justify [petitioner's] repeated surveillance." Pet. App. A66-A67.[4]

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[4] The ALJ also found that petitioner violated Section 8(a)(1) of the Act by selectively and disparately maintaining and enforcing rules concerning employee bulletin boards and mailboxes when it removed union-related notices while permitting nonunion-related notices to remain, and by selectively and disparately enforcing a rule regarding the wearing of union pins in patient care areas when it told RNs to remove union pins while permitting them to wear nonunion and nonhospital-related pins and buttons. The ALJ further found that petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by discriminatorily discharging an RN who was a leader of the organizing campaign because of her activities on behalf of the Union and by disciplining nurses for violating its discriminatorily enforced rules. The Board affirmed those findings and the court of appeals upheld the Board's order. Pet. App. A26. Petitioner does not raise any of those issues in this Court.

The Board affirmed the ALJ's unfair labor practice findings at issue here and adopted his recommended order as it applied to those issues. Pet. App. A27-A28, A36.

3. The court of appeals affirmed the Board's unfair labor practice findings and enforced its order. Pet. App. A1-A26. The court agreed with the ALJ and the Board that petitioner's maintenance and enforcement of its no solicitation/no distribution rule violated Section 8(a)(1) of the Act. In so holding, the court recognized that "[a]n employer does not violate the Act by enforcing a valid no solicitation rule pertaining to on-duty employees while engaging in antiunion solicitation of its own." Pet. App. A19-A20, citing *NLRB* v. *United Steelworkers of America (NuTone, Inc.)*, *supra*. The court also recognized, however, that, while a hospital may restrict solicitation and distribution in patient care areas "because of problems with disruption of patient care," a prohibition against "distribution or solicitation on nonwork time in nonworking areas is presumptively invalid unless the hospital demonstrates that the prohibition is necessary to avoid disruption of health care operations or disturbance of patients." Pet. App. A19, citing *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 491-492 (1978).[5] The court further noted that, in such situations, "[t]he hospital bears the burden of proving that the prohibition is necessary to lessen disruption to patients." Pet. App. A19, citing *Beth Israel*, 437 U.S. at 507.

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[5] Generally, employers cannot adopt rules prohibiting solicitation on nonworking time or distribution on nonworking time in nonworking areas. *Beth Israel*, 437 U.S. at 492-493 & n.10.

The court determined that petitioner's "antiunion solicitations in areas barred to Union sympathizers indicates that [petitioner] never needed to apply the rule in those areas." Pet. App. A20. Accordingly, the court concluded that petitioner failed to justify its no solicitation rule under *Beth Israel* because it "knew that no disruption of patient care would occur from solicitation in banned areas, such as nurses' stations." *Ibid.* In addition, the court upheld the Board's finding that petitioner applied its rule disparately. *Id.* at A21. Petitioner "allowed the sale of many nonhospital-related commercial products * * * in banned areas." *Ibid.* And while the rule permitted distribution of material in the nurses' lounges and petitioner permitted nonunion material to be distributed there, petitioner told some nurses "to cease bringing Union material to the building," and "others were prohibited from distributing Union material in nurses' lounges." *Ibid.*

Finally, the court noted that petitioner asserted "numerous arguments in an attempt to prevent enforcement of the Board's order with respect to [its] surveillance of Union activities and the Off-Duty Access Rule," but it found petitioner's contentions with respect to those violations "without merit." Pet. App. A26.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the court of appeals' holding that the Hospital enforced its no solicitation/no distribution rule disparately, in violation of Section 8(a)(1) of the Act, infringed petitioner's right of free speech under Section 8(c) of the Act,

29 U.S.C. 158(c),[6] and conflicts with *NLRB* v. *United Steelworkers (NuTone, Inc.)*, 357 U.S. 357 (1958). There is no merit to that contention.

Nutone, Inc., addressed the "very narrow and almost abstract question" of whether, where an employer has a valid rule barring employees from engaging in union solicitation during working time, its enforcement of the "otherwise valid no-solicitation rule * * * is itself an unfair labor practice" when the employer conducts "anti-union solicitation that if engaged in by employees would constitute a violation of the rule." 357 U.S. at 362. The Court declined to rule that "the coincidence of these circumstances necessarily violates the Act, regardless of the way in which the particular controversy arose or whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication." *Ibid.* The Court left it primarily to the Board "to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in light of the Board's special understanding of these industrial situations." *Id.* at 362-363.

The Board has struck a balance in the health care field that permits a hospital to prohibit employee solicitation and literature distribution during nonworking time in immediate patient care areas, but

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[6] Section 8(c) provides that:

> The expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

requires the hospital to demonstrate that a broader rule prohibiting union solicitation and distribution of union literature during nonworking time in other areas of the hospital is necessary to avoid disruption of health-care operations or disturbance of patients. This Court has approved the Board's policy as consistent with the Act. See *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 497-500, 507 (1978); *NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773, 779 (1979). The court of appeals correctly concluded that the Board properly applied that policy to the facts of this case.

While prohibiting union adherents from distributing their pro-union materials anywhere in the Hospital, petitioner itself distributed antiunion literature to RNs while they were working in banned areas, such as nurses' stations. Thus, as the court of appeals found (Pet. App. A20-A21), petitioner, far from meeting "its burden of proving that the prohibition on solicitation is necessary to lessen disruption to patients," has, "[b]y its actions, * * * demonstrated there was no need for the rule." Moreover, as the court further noted (*id.* at A21), petitioner "disparately applied the [r]ule," allowing "many non-hospital-related commercial products * * * in banned areas" while prohibiting nurses "from distributing Union material in nurses' lounges." *Ibid.* In those circumstances, the Board reasonably concluded that petitioner's maintenance and enforcement of its no solicitation/no distribution rule violated Section 8(a)(1) of the Act.

Contrary to petitioner's contention (Pet. 10-11), the Board's decision does not restrict its Section 8(c) right to campaign against the Union during the

employees' working time in any area of the facility that it chooses. But when a hospital prohibits employee solicitation and literature distribution in certain areas because it asserts that such activity in those areas would disrupt patient care, the hospital cannot then distribute its antiunion materials, and permit employees to engage in other hospital-related solicitation and distribution in the same areas without undermining, if not wholly discrediting, its assertion that pro-union solicitation and literature distribution there would be disruptive to patients.

2. Petitioner also contends (Pet. 11-13) that its right to observe and photograph union demonstrators is protected under *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). Petitioner's reliance on *Lechmere* is misplaced.

Lechmere addressed the balance to be struck when nonemployee union organizers seek access to the employer's private property. 112 S. Ct. at 845-846, 848. Here, the union demonstration was confined to county sidewalks and roads adjacent to the Hospital. Pet. App. A65-A66. Thus, there was no private property right at stake. Indeed, in *Lechmere*, the Court recognized that no balancing would have been required if the nonemployee union organizers had restricted their activity to "the public grassy strip adjoining Lechmere's parking lot." 112 S. Ct. at 850.

Petitioner errs in contending (Pet. 11) that the court of appeals' decision conflicts with *Oakwood Hospital* v. *NLRB*, 983 F.2d 698 (6th Cir. 1993), and a prior decision of the Fourth Circuit, see *NLRB* v. *Southern Maryland Hospital Center*, 916 F.2d 932

(1990).[7] In both of those cases, the union organizers were conducting their organizational activities on the hospital's property, specifically, the hospital cafeteria. *Oakwood*, 983 F.2d at 703; *Southern Maryland*, 916 F.2d at 936-939. Here, the pro-union demonstration was held on public sidewalks and roads adjacent to the Hospital.

3. Petitioner contends (Pet. 13-14) that the Board erred in its analysis of whether petitioner's enforcement of its limitation on access to the Hospital by off-duty employees violated the Act. Quoting *GTE Lenkurt, Inc.*, 204 N.L.R.B. 921, 921-922 (1973), petitioner contends (Pet. 13) that the Board has ruled that "the status of an off-duty employee 'is more nearly analogous to that of a non-employee'" than to an employee who is on the premises to work. Accordingly, petitioner argues (*ibid.*) that, in evaluating access limitations placed on off-duty employees, the Board must weigh the employer's private property rights in the balance.

The Board, however, has specifically limited the reach of the *GTE Lenkurt* standard for access by off-duty employees, holding that an employer may enforce a rule barring off-duty employees access to its premises if the rule

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those

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[7] Any intra-circuit conflict with a Fourth Circuit decision would not warrant review of the decision below in any event.

> employees engaging in union activity. * * * [E]xcept where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

Tri-County Medical Center, Inc., 222 N.L.R.B. 1089, 1089 (1976). Petitioner contends (Pet. 14) that the *Tri-County* standard for assessing the validity of off-duty employee access rules is "inappropriate" in light of this Court's holding in *Lechmere*. According to petitioner (Pet. 14), the Board should not review the reasonableness of the employer's business justification, but should focus on whether the off-duty employees have an adequate alternative means to communicate their message to other employees.

It is doubtful that *Lechmere*'s standard for addressing the access rights of nonemployee union organizers should be extended to govern the access rights of off-duty employees (whose own Section 7 rights are at stake and may be furthered by organizational activity). This case, however, does not squarely present that issue. Even if the *Lechmere* approach were applicable, the Board's finding of a violation here is justified, because petitioner's rule was discriminatorily applied. Petitioner allowed off-duty employees access to its premises for numerous activities that were unrelated to work and denied access only to those off-duty employees engaging in activities on behalf of the Union. As *Lechmere* reaffirmed, even a nonemployee organizer is entitled to access when the employer's no-access rule is discriminatorily applied. 112 S. Ct. at 847; see also

NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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